RIGHTS AND DUTIES OF ENGLISHWOMEN

A STUDY IN LAW AND PUBLIC OPINION

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by

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To

The Honourable Mrs. Cawley

and my friends of the

National Council of Women

FOREWORD

"DON'T talk to me of Sisyphus," exclaims the woman in a *Punch* cartoon of pre-War days, as the Franchise Bill which she has been struggling to push up Constitution Hill slips once again from her grasp and rolls to the bottom.

Readers of Dr. Reiss's book may well say the same, for each of her chapters record for a separate field of 'women's rights and duties' labours as indomitably pertinacious, though happily not as futile, as those of Sisyphus. In nearly though not quite every case the stone has been pushed, usually after several complete failures and then by slow stages, either to the top of the hill or a long way up it. Those of us who took part in the struggle in any of its phases and who now look back on the results often ask ourselves, not whether it was worth while—we have no doubts as to that—but whether we regret that it was necessary. On the one hand the women's movement taught women, and some men, much that they might never have learned if success had come more easily—much of the theory and practice of democracy, of the arts and crafts of organization and propaganda, of the spirit of communalism as between women of every class, creed, race, and nation; much—best of all—of that passion for freedom and for self-determination which is the best guarantee that these things once won will never be surrendered. "Light come, light go", might be written on the gravestone of liberty in many lands; it will never be an epitaph on the liberties of British women. "With a great price obtained we this freedom". That is the case for gradualness.

On the other hand it is, or should be, impossible to read this

book without suffering pangs of stinging regret for all those for whom success in the struggle came too late; of whom Florence Nightingale wrote: "Why have women passion, intellect, moral activity—these three—and a place in society where none of these three can be exercised? The system dooms some minds to incurable infancy, others to silent misery."[1] Our regrets, and still more our gratitude, are also due to the innumerable known and unknown workers in the women's movement who did not live to reap or even see the harvest. Fortunately they belonged to generations who found it easier than we find it to-day to live by faith, believing that success must come as part of the steady and ordered progress of society. But do the young women of to-day who can say "but we are free-born" often remember or even know their debt to these pioneers?

If not, this book will enlighten them when they consult it, as they probably will, for the light it throws not on the past but on the present and the future rights and duties of themselves and their daughters. That indeed, as Dr. Reiss explains in her preface, has been her main objective; and though her book, as a lawyer's should be, is precise in its facts and precisely documented, it is not merely a record of facts but a penetrating discussion of tendencies and of needs still unmet. Reforms, as she shows, are still needed in every part of the field—in the sphere of civil and political rights, and most of all, in the economic sphere. This last presents the toughest problems, just because they cannot be solved, at least not fully, by the mere removal of legal disabilities, but need constructive changes in an economic structure devised by and for men. You may tell a married woman that, thanks to the legal changes described in this book, she now enjoys equality with her husband in respect of rights of citizenship and of property and of parenthood. But if she has no income of her own and is prevented

[1] Page 216.

by the burden of family cares or the jealousy of male competitors from earning one, she may find her legal equality but a fleshless bone. The economic dependency of the married woman is the last stronghold of those who, consciously or unconsciously, prefer woman in subjection, and that perhaps is why the stronghold is proving so hard to force.

Only three years are needed to complete a century from the beginning of the Victorian era, which Dr. Reiss regards as beginning "that different outlook in public opinion and even in law from which all the later changes have evolved". It would be satisfactory to tidy minds if in those three years the process of women's emancipation could also be completed. But History is seldom so neat-fingered, and it will take longer than that.

This, I believe, is the completest and most up-to-date survey of the subject that has yet appeared. It will be useful not only for one reading but for constant reference, and not only to English women. The women of other countries, especially perhaps those of India, where constitutional democracy is now in the making, will find it suggestive, allowing, of course, for differences in national or racial conditions, both as to the reforms and aims and in the method of achieving them. The spirit of internationalism has always been strong in the women's movement, and we are not ashamed to learn from each other.

ELEANOR F. RATHBONE

August 1934

PREFACE

WHEN this study was commenced the intention was to investigate current and proposed legislation[1] affecting the rights and duties of women and to review the tendency of this legislation as affected both by public opinion and philosophic thought. As the inquiry proceeded it seemed clear that the historical aspect of the problem was of paramount importance and hence the plan of the book is based on the development of law and public opinion. The position as we find it to-day cannot be understood unless we place it in its historical setting, and although the past cannot tell us what we ought to be nor yet what will be, since each age brings forth new factors and requires new forms, yet it can teach us many lessons which we ignore at our peril. Arguments of apparent force may dwindle into nothingness when confronted with their own invalidity on previous occasions, tendencies may be detected leading logically to a proposed change which may thus be seen to introduce no new principle but to be merely an extension of a principle long since accepted.

" A legal right " is defined by Sir T. Holland as " a capacity residing in one man of controlling with the assent and assistance of the State the actions of others " [2] and by L. T. Hobhouse as " a claim upon others which he may make or which may be made for him . . . recognized by law." [3]

[1] The term " legislation " includes judicial as well as parliamentary legislation. See Dicey, *Law and Public Opinion*, Ch. XI., and Appendix Note IV.

[2] Holland, Jurisprudence, Ch. VII.

[3] L. T. Hobhouse, *Elements of Social Justice*, Ch. II

Law, at any time, depends on and reflects the particular conception of rights and duties accepted by the public opinion of the day.[1] But in the nineteenth century law rested in more than passive consent. Public opinion was actively fashioning changes in our legal system and we shall see that in every sphere law has reacted to changing conceptions of woman's functions and requirements. The changes came slowly, not in obedience to an abstract theory of rights and duties but each claim having to justify itself, to prove that its satisfaction was in the general interests of society. Gradually, step by step, each one laying a sure foundation upon which subsequent ones might rest, legislation has conceded to women the opportunities which she demanded. The process is not yet completed. The claims put forward to-day are the children of the claims and legislation of yesterday, and, though they too will have to prove that the changes brought about by their satisfaction can be reconciled with the claims of others, yet they will have the sympathetic consideration of public opinion which, some years ago, would have dismissed them as fantastic. "Some," wrote Henry Sidgwick to Sophia Jex Blake, who, in 1869, wished to apply for admission to Cambridge University as a medical student, "are very strongly of opinion that it will do more harm than good. After much hesitation I have come myself to this latter view, not on general grounds . . . but because we have hitherto done what we have done for women's education by great quietness and moderation . . . if our present scheme for examining women succeeds it will be easier to take a further step. . . . Your application now would thus seem to be a 'breach of continuity' and would appear extravagant to many undecided people who after a few years may be brought to look upon a similar application as quite natural. . . ." [2]

[1] Though by the time public opinion is ready to translate itself into law new thoughts and new ideals are often struggling to make themselves heard. Cf. Dicey, *Law and Opinion in the Nineteenth Century*.

[2] *Life of S. Jex Blake* by Todd p. 225.

PREFACE

The year 1837 has been chosen as the moment from which to trace the evolution of woman's rights and duties because the early years of Queen Victoria's reign, though they witnessed but few changes in the legal position of women, did witness the beginnings of that different outlook in public opinion and even in law from which all the later changes have evolved. Hence the position in 1837 has been portrayed in Chapter I, while in the succeeding chapters an attempt is made to show how the present legal rights and duties of women have been secured, and to examine some of the proposed legislative changes.

I desire to thank Professor J. L. Brierly of All Souls College, Oxford, Professor R. A. Eastwood of the Victoria University of Manchester, and, in particular Professor J. J. Findlay of the Victoria University of Manchester for their helpful suggestions. My grateful thanks are due to Miss D. Foster Jeffery, Barrister-at-Law and to Mrs. E. C. Gates for their assistance in reading the proofs and compiling the index, and to the secretaries of societies, too many to mention individually, who have kindly provided me with information. I also desire to acknowledge my indebtedness to the Trustees of the Stansfeld Trust.

April 1934 E. R.

CONTENTS

CHAPTER I

RIGHTS AND DUTIES IN 1837

IDEALS OF WOMANHOOD

LEGISLATION by 1837 was beginning to reflect the ideals of social and political progress which Bentham and his school had been propounding for some thirty years. The principles introduced by the French Revolution had been long in bearing fruit in England; the excess perpetrated by the revolutionists made moderate men hesitate and gave to the forces of reaction and narrow conservatism a new momentum. Indeed the abstract philosophy of the French Revolution never affected English legislation; we have no "Declaration" in which we can find the abstract rights of man. But Philosophical Radicalism, though it looked upon "natural rights" as nonsense, "nonsense upon stilts",[1] secured for the individual those rights and opportunities which, from a practical point of view, were all that mattered. With the coming of the Reform Act the forces of reaction had spent themselves; the excesses of the Revolution were forgotten, and the new ideal of the equality of men gave to all a new hope. Privilege was to disappear before equality, birth was to give way to worth. Old traditions and prejudices were crumbling before a new belief in reason; nothing could be accepted merely because it had been.

The Benthamite School swept away the effete and obstructive legislation which before 1832 hampered the free growth of the individual and guaranteed the privileges of the few.

[1] Bentham, *Anarchical Fallacies*, Works, Vol. II., Art. II., p. 501.

The principle of the Greatest Happiness of the Greatest Number, the belief that the happiness of the humblest is as important as the happiness of the most exalted; above all, the conviction that every individual is, as a rule, the best judge of his own happiness when translated into concrete enactments, gave to the individual a freedom that had never before been his. The Combination Acts of 1824 and 1825[1] extended to both masters and men the right to combine; the repeal of the Corn Laws in 1846 relieved trade of the restraints which had for so long hampered it; various Acts[2] gave more freedom to the transfer of land, while the right of the individual to religious liberty found expression in such Acts as the Roman Catholic Relief Act of 1829.[3] Everywhere unessential differences were being disregarded; the social conscience had admitted that many differences had been artificially induced, had acknowledged in all vital respects the similarity of peer and peasant. "A man's a man for a' that" Burns had sung, and the words found an echo in many hearts. Coincident with the belief in the equality and liberty of man went the ideal of the brotherhood of man. However difficult it may be to make utilitarian ethics consistent on the question of altruism and egoism, it cannot be doubted that a great wave of humanitarianism and social solidarity spread over the country which made the more fortunate anxious to help their less fortunate brethren, and found expression in movements like those for the repeal of the Corn Laws or the abolition of slavery.

This, then, was the general social background, expressing itself in every direction in greater freedom for the individual. Yet none of the legal disabilities of women had been removed by 1837; indeed the Reform Act of 1832,[4] and the Municipal

[1] 5 Geo. IV, c. 95; 6 Geo. IV, c. 129.
[2] e.g., Inheritance Act, 3 & 4 Wm. IV, c. 106; Fines and Recoveries Act, 3 & 4 Wm. IV, c. 74.
[3] 10 Geo. IV, c. 7.
[4] 2 & 3 Wm. IV, c. 45.

Corporation Act of 1835,[1] had given statutory sanction to what had hitherto been but a customary disability. How came it, we may ask, that an age whose first article of faith was a belief in the value of the franchise, should by the very Act which extended it to men, deprive women of their right? How came it that James Mill, that ardent and convinced individualist, should emphasize a man's right to a voice in the direction of affairs and yet declare that woman's interests were sufficiently protected by vicarious representation?

The answer is not hard to find. The minds of men, as Professor Jethro Brown[2] puts it, were no doubt prepared to apply the ideals of the day to women as to men; but this in itself was a mere abstraction to which concrete contents must be given if any practical change was to ensue. The social conscience might be prepared to grant opportunities necessary to the development of personality, but little change could be expected unless and until it were shown that the personality developed under existing conditions was incomplete and capable of infinite variety and extension. Woman presented a problem entirely different from man. One might admit, on *a priori* grounds, the equality of man with man; in any case one might assume it. But to the average man there was no such reason for assuming the likeness of man and woman; no necessity, therefore, for admitting the claim to equality of opportunity. Woman for centuries had been held to be of different clay, requiring different opportunities for her development, finding her mission in life through entirely different functions. It was not from man that the challenge to this ideal would come; it could come only from woman, and from woman conscious that both she and humanity were the poorer because opportunities were denied to her.

Now of the women who had been forming public opinion

[1] 5 & 6 Wm. IV, c. 76.
[2] W. Jethro Brown. *Underlying Principles of Modern Legislation*, Ch. 2, s. 3.

during the crucial years in which liberal views were gaining ground many accepted the old conventional ideal of womanhood. Mrs. Barbauld and Hannah More were both contemporaries of Bentham and James Mill; both women have left reputations as writers, both belonged to the famous Blue Stocking circle—which included Elizabeth Montagu, Mrs. Carter. Mrs. Chapone and Fanny Burney—and of which they were the younger members. Yet they were quite content to sink the personality of woman entirely in that of man, to accept it as her mission in life that she should be not complementary but ancillary to him.[1] The view accepted by them was the one put forward by Milton[2] and later with great force by Rousseau in the fifth chapter of his *Émile*. "La femme est faite spécialement pour plaire à l'homme . . . si la femme est faite pour plaire et pour être subjugée, elle doit se rendre agréable à l'homme au lieu de la provoquer. . . . Hors d'état d'être juges elles-mêmes, elles doivent recevoir la décision des pères et des maris comme celle de l'église." The whole of Book V of *Émile* is worth reading, for it lays down most clearly the whole duty of woman according to the lights of the day. One other passage, however, must be quoted, since it asserts as axiomatic that principle which, above all others, modern feminists have denounced as being the root cause of woman's disabilities: "La femme et l'homme sont faits l'un pour l'autre, mais leur mutuelle dépendance n'est pas égale: les hommes dépendent des femmes par leurs desirs; les femmes dépendent des hommes et par leurs désirs et par leur besoins; . . . Pour qu'elles aient le nécessaire, pour qu'elles soient dans leur état, il faut que nous le leur donnions, que nous voulions le leur donner, que nous lesen estimions dignes; elles dépendent de nos sentiments, du prix que nous mettons à leur mérite, du cas que nous faisons de leur charmes et de leurs vertus.

[1] *The Emancipation of Englishwomen*, W. Lyon Blease: *Women in Subjection*, I. B. O'Malley.

[2] *Paradise Lost*, Book IV, 440.

Par la loi mêmes de la nature, les femmes, tant pour elles que pour les enfants, sont à la merci des jugements des hommes; il ne suffit pas qu'elles soient estimables, il faut qu'elles soient estimées. . . ."

Regarded as mentally and physically inferior to man, woman was, by her very nature, held to be incapable of leading the varied life of man, incapable of assuming his responsibilities or enjoying his opportunities. She was frail, easily influenced, foolish, requiring his protection not only against an inclement world but also against her own weakness, not only in her own interest but also in the interest of man. Hence her subjection to man could be justified on two grounds. "Adam," says St. Ambrose, "was beguiled by Eve, not Eve by Adam. It is just that women should take as her ruler him whom she incited to sin that he may not fall a second time through female levity."[1] "Behold these smiling innocents whom I have graced with my fairest gifts, and committed to your protection," wrote Dr. Fordyce in 1765, addressing man in the name of Nature; "behold them with love and respect; treat them with tenderness and honour. They are timid and want to be defended. They are frail; oh, do not take advantage of their weakness."[2]

We shall now see how law in 1837 reflected this ideal of womanhood.

1 St. Ambrose, quoted *Decretals* II, c. 17.

2 Quoted by Mary Wollstonecraft: *Vindication of the Rights of Women*, Ch. 5, s. 2. Sermons by Dr. Fordyce. See also Dr. Gregory's *Legacy to his Daughters*.

WOMAN AS WIFE

HUSBAND'S RIGHTS

(1) *To Wife's Consortium.* According to English law a woman owed complete obedience to her husband; he had the right to her absolute fidelity, to her society and to her services—in legal language, to her *consortium.* His domicil became her domicil, and her marriage vow laid upon her the duty to reside with him wherever he might choose to live.[1] Her property, with a few partial exceptions, became his property,[2] and over the children of their marriage his rights were absolute.[3] A woman, in law, belonged to the man she married; she was his chattel. Legally he could not sell her, for the marriage relationship was an indissoluble one; but when Michael Henchard, in *The Mayor of Casterbridge*, handed over his wife with the words: "I take the money, the sailor takes you," he was merely doing what had been done in actual life many times,[4] and the old idea of ownership lives on to-day in the habits and outlook of many men and women of the masses.[5] He was master, she vassal; a relationship which found expression in the Middle Ages in the law which made murder of a wife an ordinary felony punishable with death by hanging; murder of a husband, the murder of a superior by an inferior, and thus *petit treason*, punishable with death by burning after having been drawn to the stake.[6]

English law, as we know, contains no written constitution; we may search in vain for a declaration containing the abstract rights of man and woman. Those rights only are real

1 Blackstone's *Commentaries*, Vol. I, Chap. xv.
2 See p. 20 *post*. 3 See p. 15 *post*.
4 *Notes and Queries*, 4th Series, No. x., Oct. 1872; Nov. 9, 1872.
5 *The Woman in the Little House*, Leonora Eyles.
6 Abolished by 9 Geo. IV, c. 31.

which can be enforced by the Courts. And a man could enforce his rights against his wife either directly or indirectly. He could, if without sufficient reason his wife refused to live with him, bring a suit in the Ecclesiastical Court for restitution of conjugal rights, and the order compelling her to return to him would be enforced by imprisonment. He could by force compel her to live with him; he could restrain her personal liberty. "He may," says Bacon, "beat her, but not in a violent or cruel manner . . . and may, if he think fit, confine her, but he must not imprison her." . . . "For the happiness and honour of both parties the law places the wife under the guardianship of the husband; and entitles him, for the sake of both, to protect her from the dangers of unrestrained intercourse with the world, by enforcing cohabitation,"[1] and of this privilege the Courts would deprive him only if gross misconduct on his part could be proved.[2] A married woman might thus be denied a right which was secured to every man and every single woman—the right to personal freedom.

(2) *To Withdraw Consortium.* Indirectly, a husband could enforce his rights to his wife's *consortium* by withdrawing from her his protection and his support if she failed in her wifely duty. His obligations to her we have yet to consider, but we may notice here that almost any deviation from her obligations absolved him of them. If she left him of her own free will, without his consent, and without what was regarded as justification, she forefeited all rights to maintenance and to the protection of his home. If she was unfaithful to him and left him, all his

[1] Bacon *Abridgement*—Baron and Feme (B); *In re* Cochrane. 8 Dowl. 636.

[2] Gregory's Case, 4 Burr, 1991. A separation agreement was held "to be a formal renunciation by the husband of his marital right to seize her, or force her back to live with him." R. *v.* Mead. 1 Burr. 542. and p. 12 *post*.

3 Bolton *v.* Prentice, 2 Strange's Rep., p. 1214. Robinson *v.* Gosneld. 6 Mod. 171. Hindley *v.* Marquis of Weastmeath. 6 B. & C. p. 200.

duties ceased, unless he had condoned her infidelity and taken her back; he could institute proceedings for a judical separation, known at that time as a divorce *a mensa et thoro* (divorce from bed and board), and possibly get an Act of Parliament to annul his marriage altogether. We shall consider the question of divorce in more detail later.

A man had the right to sue and to claim damages from any one who deprived him of the services and society of his wife, whether by causing her an injury or by enticing her away from him and harbouring her against his will.[1] He could bring an action against the man with whom his wife committed adultery, and until such an action, known as an action for *criminal conversation*, was brought, and a sentence of divorce *a mensa et thoro* in the Ecclesiastical Courts obtained a divorce by private Act would not be granted.[2]

(3) *To Maintenance.* A man had no claim on his wife for maintenance but, as we shall see, his rights over her property were almost absolute.[3]

WIFE'S RIGHTS

What, then, were the rights of a woman—what obligations did a man assume when he entered on marriage, and, above all, how were her rights enforced?

(1) *To Maintenance.* A wife living with her husband was presumed to have his authority to pledge his credit for necessaries—she was, that is to say, entitled to assume his consent to order goods which would enable her to keep up appearances consistent with his position in society.[4] But the presumption was one of fact, not of law,

1 Blackstone, Vol. III, Ch viii. Winsmore *v.* Greenbank (1745) Willes. 577.

2 Pollock. *The Law of Torts,* Ch. vi. iii.

3 See p. 20 *post.*

4 Bacon—Bacon and Feme (H). This presumption also arose where a woman was living with a man though not married to him.

and would be rebutted if facts showed that such authority had not been given.

If, therefore, a man prohibited "particular persons from trusting her, he shall not be liable . . . but a general warning or notice in the *Gazette* or other newspaper not to trust her is not a sufficient prohibition."[1] If, even without such prohibition, the goods ordered were not necessaries and were not ordered by his authority, either express or implied, then again his liability was rebutted. Further, it lay entirely with the husband to decide what were necessaries and which style of living he would adopt. The old-fashioned language of Mr. Justice Hyde, who gave judgment in a case heard in 1672,[2] was equally applicable in 1837: "The wife will have a velvet gown, and a satin petticoat, and the husband thinks mohair or farendon for a gown and watered tabby for a petticoat is as fashionable and fitter for his quality. . . . Of absolute necessity in the case of apparel or food the law of the land takes notice and provides a remedy for the wife . . . but whether this or that apparel, this . . . meat . . . be most necessary or convenient for any wife, the law makes no person judge thereof but the husband himself, and in those cases no man is to put his hand between the bone and the flesh." A woman's authority while living with her husband, depended on his will, she was an *agent at will*; the law would assume that she had the right to pledge his credit for certain things and enforce that right so long as no action of his had rebutted the presumption. Only for absolute necessaries, and only then if she were not otherwise provided[3] for, did she become an *agent of necessity*, with power to pledge his credit even against his will. "It is clear," said Bacon, "that a husband may by law be compelled to find her necessaries, as meat, drink, clothes,

[1] Bacon Abr., Baron and Feme (H).
[2] Manby *v.* Scott. 1 Mod., 124.
[3] Holt *v.* Brien, 4 B. and Ald., 252. Bacon, Abr., Baron and Feme (H).

physic, etc. . . ." [1] Of absolute necessity in the case of apparel or food," said Mr. Justice Hyde, "the law of the land takes notice and provides a remedy."

Where husband and wife lived apart there was no presumption of agency, except where the separation was caused by the cruelty or desertion of the husband. In such cases a woman became an *agent of necessity*, in other words her right of contract for necessaries existed independently of her husband's will, and the jury and not the husband were called upon to determine whether or no a purchase was necessary to enable her to keep up appearances consistent with his position in society, and whether or no she was sufficiently provided for without pledging his credit.[2] Whether she could pledge his credit if she was herself capable of earning her own living seems to have been doubtful, and it was suggested in 1828 that under such conditions the husband would not be liable.[3]

Where husband and wife lived apart by mutual consent adequate maintenance or an adequate allowance made by the husband deprived her of her right to pledge his credit, but if the allowance was not paid then her right revived as it did if a jury held it to be insufficient to meet her legitimate needs, and this even though she herself had agreed to the amount. "Otherwise," said Lord Ellenborough, "a husband would be discharged on proof that he paid forty shillings a year." [4]

A woman who left her husband without his consent and in circumstances which did not justify her living apart, forfeited her right to pledge his credit, but her right might perhaps revive if she desired to return to him and he refused to receive her at all.[5]

1 Bacon's Abr., Baron and Feme (H).
2 Emmett *v.* Norton, 8 C. and P. 506; Bird *v.* Jones, 3 Man, and Ry. 121; Clifford *v.* Laton, M. and M. 10 1; Bacon, as above (H).
3 Warr *v.* Huntley, 1 Salk, 118. 4 Hodgkinson *v.* Fletcher, 4 Camp. 70.
5 Manby *v.* Scott, I Mod. Rep. 124. Child *v.* Hardyman, 2 Stra, 874.

We see, then, that a married woman to whom tradesmen would give credit on behalf of her husband could, to a certain extent, enforce her right to maintenance. But to a woman of the lower orders such a right was of little avail, since her husband had no credit which she could pledge, and for her the law made no provision. Her one resource was the workhouse; and only when she became chargeable, and only while she remained chargeable, was it possible to take action against him. The right was vested not in her but in the workhouse authorities, who could bring a civil action against a man to enforce maintenance of wife and children under the Poor Law Amendment Act of 1834[1] and could prosecute him for neglect to do so under the Vagrancy Act of 1824.[2]

We may note here, leaving further comment till later, that on marriage a man assumed responsibility for his wife's antenuptial debts and for her torts.[3]

(2) *To Consortium.* The other right which a woman acquired on marriage was the right to her husband's society and protection. How did she enforce these rights? If he lived apart from her without sufficient reason she could, as we have seen he could under similar circumstances, compel him to return to her by means of a decree of restitution of conjugal rights,[4] disobedience to which would be punished by imprisonment. But she could not, as he could, compel his *consortium* without an order of the Court nor in any way interfere with his personal freedom. Nor could she enforce her rights indirectly, for the law did not absolve her from her duties as a wife when he repudiated his duties as a husband as it did in the converse case. Rights and duties were, legally, at any rate, not correlatives. If he deserted her, her property remained in his possession, even the property which she had earned during such desertion; he could come back at any

[1] 4 and 5 Wm. IV., c. 76.
[2] 5 Geo. IV., c. 83.
[3] See pages 31 and 33 *post*.
[4] Blackstone, Vol. III., Ch. VII.

moment and insist on the resumption of cohabitation, and his rights over the children of the marriage were unimpaired so that he could claim and obtain custody of them even though for a time he had allowed them to remain with their mother,[1] even though they were infants at the breast. She could, we have noted, pledge his credit, but where no credit was to be obtained a woman had no alternative but the workhouse unless she could earn her own living, and under such circumstances her earnings would be paid to him if he chose to claim them.

(3) *To Withdraw her Consortium.* If, instead of deserting her, a man ill-treated his wife or was unfaithful to her, only one redress, that of withdrawing her *consortium*, of herself putting an end to cohabitation, could be of value to her. But what conduct on his part would justify such an action, what degree of cruelty or misconduct would the Courts accept as sufficient justification for leaving her husband's home? In 1837 the connotation of the word "cruelty" was wider than at the beginning of the century, for apprehension of ill-treatment was held a good cause for putting an end to cohabitation, whereas in 1811 it was declared that "nothing but actual terror and violence" would justify such a course.[2] We shall see how legislative enactments have extended the meaning of the world ill-treatment and thus given to a married woman the power to enforce her husband's *consortium*. In 1837 the law afforded her hardly any redress even where it acknowledged the man's repudiation of his share of the marriage contract. The Court, it is true, would not allow him to enforce cohabitation[3] if cruelty were proved to be the cause of her leaving him; it

1 R. *v.* Greenhill, 4 A. & E. 624.

2 cf. Emery *v.* Emery, 1 Y. and J., 501; Houliston *v.* Smyth, 3 Bing. 127, and Horwood *v.* Heffer, 3 Taunt, p. 421.

3 Gregory's Case, 4 Burr., 1991. She could also bind him to the peace.

would allow her to pledge his credit as an agent of necessity, it might secure to her an equity to a settlement.[1] But her property remained in his possession and her rights over the children were in nowise increased. So that, even if he forfeited by his own behaviour rights over her person, he still retained rights over her property and her children, thus making it impossible for most mothers of a virtuous character to assert their rights as wives.

We have seen, in speaking of a man's rights to his wife's *consortium,* that if she repudiated her obligations to the extent of being unfaithful to him he could institute proceedings for a *divorce a mensa et thoro* or possibly get an Act of Parliament to set him completely free. We have now to inquire whether she could enforce her rights in the same way. *Divorce a mensa et thoro*—what we should call to-day a judicial separation—was granted by the Ecclesiastical Courts, which had complete jurisdiction over matrimonial matters, and it was granted to men and women equally for adultery and for cruelty but not for desertion. If such an action were brought by the husband he could sue in the Common Law Courts the man whom he accused of adulterous intercourse, and only if he brought both proceedings could he obtain a divorce by Act of Parliament. A divorce granted by the Ecclesiastical Court relieved each of the presence of the other, but it gave no permission for re-marriage, and to the woman, though she be the innocent party, it gave no right to her property, but merely a small allowance in the shape of alimony.[2] Real divorce, carrying with it the right of re-marriage, was not recognized by the Common Law or Ecclesiastical Law of England, though by a number of fictions the Church had invented reasons for declaring a marriage null and void *ab initio.* But this divorce *a vinculo matrimonii* did not dissolve

[1] See p. 24 *post.*

[2] Blackstone, Vol. III, Chap. VII.

a marriage, it declared it non-existent, and it could not be granted for any cause arising subsequently to marriage. Since the Reformation divorce had, however, crept in by the back door. The Common Law still did not recognize it, but it now became possible to obtain a special Act of Parliament to pronounce a complete divorce. In the debates on the Divorce Act in 1857 it was declared that a "Bill of Divorce costs from £700 to £800, and instances are of no infrequent occurrence where the expense amounts to several thousands, and where the proceedings are protracted for a long series of years."[1] Under such circumstances divorce became a luxury in which only the rich could indulge, a privilege of the upper classes which was denied to the lower orders. As regards men and women, theoretically they had equal rights, for a special Act could be passed at the instance of either man or woman. But practically divorce granted to a woman was very rare,[2] for, in strict accordance with the ideals of the time, infidelity on the part of man was not felt to be sufficient justification for his wife to withdraw her *consortium*,[3] unless it was accompanied by some more heinous offence.

Whether a married woman could maintain an action for the loss of her husband's *consortium* is doubtful. In any such action her husband would have had to be joined with her as plaintiff for, as we shall see, she could not sue by herself, and no such action appears to be on record.[4] Neither, it has been held, could she maintain an action for *criminal conversation* against the woman with whom her husband was carrying on

1 Parliamentary Debates, 20 May, 1856. Vol. 142, p. 401.

2 The first application was made in 1801—130 years after the first Act to relieve a husband was passed. See Macqueen, *House of Lords and Privy Council.*

3 cf. Johnson's views—Boswell's *Life of Johnson*, Ed. Fitzgerald, Vol. I, p. 347.

4 cf. Lords Campbell and Cranworth; Lords Brougham and Wensleydale, in Knight *v.* Lynch, 9 H. L. Ca. p. 577.

an adulterous intercourse.[1] She could bring such an action in the Spiritual Court, but if she did so and obtained a sentence and costs, "the husband may release these costs, for the marriage continues, and whatever accrues to the wife during coverture belongs to the husband." [2]

(4) *Nationality.* As it was a principle of Common Law that British nationality could be neither lost nor acquired by mere operation of law but only by the express desire of the person concerned, marriage neither deprived a woman of her British nationality when she married a foreigner, nor conferred British nationality on a foreign woman on the ground that she had married a Britisher.[3] But a married woman could not acquire a domicil independently of her husband, not even, it appears, if she were separated from him by a divorce *a mensa et thoro*.[4]

WOMAN AS MOTHER

LEGITIMATE CHILDREN

(1) *Parents' Rights to Custody and Services.* Over children during minority born in lawful wedlock the father had an absolute control. He could confine them, he could inflict punishment upon them, and he had, against the whole world, a right to their custody and services. Hence a father could sue the man who seduced his daughter if he could prove that the act deprived him of the girl's services.[5]

1 Ibid., per Lord Campbell.

2 Bacon's Abr., Baron and Feme, (D).

3 Report by the Select Committee on the Nationality of Married Women 1923.

4 Dolphin *v.* Robins., 7 H. L. Ca. 403.

5 Blackstone, Vol. III, Ch. VIII.

This right held good not merely against a third person but also against the mother of his children. All rights were vested in him; he could, history shows that he did, remove the children from the care of the mother into the care of his mistress; he could deprive her even of access to them. A long series of judicial decisions had recognized the father's right "by nature and by nurture" to the custody of his children, and he, and he alone, had the right to decide what their religion and what the general conditions of their upbringing should be,[1] though he might forfeit his rights by gross immorality.[2] The threat which Thackeray's "Barry Lyndon" held over his wife's head was no empty one. "Then she would threaten to leave me; but I had hold of her in the person of her son, of whom she was passionately fond." We realize how complete were the rights of the father, how powerless was the mother when we read the story of Mrs. Norton's attempts to see her children; of her long wait on the quay in a vain attempt to catch a glimpse of them before they embarked for Scotland; of the refusal of her butler to allow her to enter her husband's house to see her own children.[3] If a man deserted his wife or by his conduct caused her to desert him, leaving the children in her possession, and then applied for a writ of *habeas corpus* in order to obtain them, the Court had no power to recognize her rights as a mother except under very special circumstances. "The Court has . . . intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as where there was apprehension of cruelty or of contamination by some exhibition of gross profligacy. . . . But here it is impossible to

1 R. *v.* Greenhill, 4 A. and E., 624; Talbot *v.* Earl of Shrewsbury, 4 My and Cr. 672.

2 Shelley *v.* Westbrooke (1817) Jac. 266.

3 See *Life of Mrs Norton*. J. G. Perkins.

say that such danger exists . . . although there is an illicit connection . . ." [1]

It will be seen from the above judgment that in certain cases, where the father's conduct was so dissolute as to be obviously harmful to his children, the Court of Chancery had the power to act *in loco parentis*. When and how the Court first acquired this power is not known,[2] but it was exercised only in very extreme cases. But the law afforded no means by which the mother's wishes could be considered, and no Court could grant her even access to her children as a matter of right. The right of the father was so absolute that it was held to be inalienable; he could not of his own free will deprive himself of it, and a separation agreement between husband and wife was regarded as void because it contained a clause giving the custody of children to the mother.

A woman's rights over her children after the death of her husband depended also on his wishes. He could, by will make her testamentary guardian,[3] but he could also appoint other guardians and deprive her of all rights—"Mothers have no rights, as such, to interfere with testamentary guardians".[4] This was so even if he was a minor until the Will's Act of 1837 made the will of a minor invalid.[5] A woman could not appoint a guardian by will since the Act of Charles II did not apply to her.

As between husband and wife, then, the man and not the woman had all the rights in respect to children of the marriage. The duties of children were towards the father and not towards the mother. "During the father's life, the mother, as such, is entitled to no power, but only to reverence and

1 R. *v.* Greenhill, *supra*.
2 Wellesley *v.* Beaufort, 2 Russ., 1; *in re* Goldworthy, 2 Q.B.D., 75.
3 12 Car. II., c. 24. 4 Talbot *v.* Earl of Shrewsbury. 4 My. and Cr. 672.
5 Vic., c. 26, s. 7.

respect."[1] Only in one respect did the law impose a direct obligation on a child and that was by means of the Poor Law Enactment which stated that "the children of every poor, blind, lame and impotent person, or other person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person." But a married woman would not be liable, for she had no property and her husband no responsibility.[2]

(2) *Duty to Maintain.* With regard to the duties of a parent to maintain the Common Law imposed none, and the only statutes which exercised any kind of control were poor law enactments. The Poor Law Act of Elizabeth had made the parent of a child to whom poor relief was given liable for its support and the liability was reaffirmed by the Poor Law Amendment Act of 1834.[3] But it was held that this liability did not extend to a woman under coverture.[4] Neglect to maintain was a criminal offence under the Vagrancy Act of 1824.[5]

ILLEGITIMATE CHILDREN

In English law the illegitimate child was "*quasi nullius filius*";[6] he could not inherit, he had no legal guardian in the sense in which a legitimate child had a legal guardian in his father. But the mother and not the father was held to have the natural right to such a child, and the Court would prefer her in case of dispute,[7] though a guardian appointed by her would not have the right to the custody of an infant as against the father. With regard to maintenance, the old laws were repealed

1 Bacon's Abr., Baron and Feme.
2 43 Eliz., c. 2; Coleman *v.* Overseers of Birmingham, 6 Q.B.D., 615.
3 4 & 5 Wm. IV., c. 76.
4 Coleman *v.* Overseers of Birmingham, 6 Q.B.D., 615.
5 5 Geo. IV, c. 83. 6 Bacon's Abr., Bastardy.
7 *Exparte* Ann Knee, B. & P., N.R., p. 148.

by the Poor Law Act 1834. Before that date various Acts sought to relieve parishes from charges arising from having to maintain bastard children. Two Acts, passed in 1773 and 1809, empowered Justices to send to prison any man charged on oath by a woman as being the father of her bastard child unless he either gave security to indemnify the parish or married the woman.[1] The abuses to which the law gave rise were notorious.[2] The Act of 1834[3] repealed all punitive provisions affecting both the mother and the putative father and the provisions relating to the liability of the man. "Every child that be born a bastard after the passing of this Act shall have and follow the settlement of the mother . . . and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child . . . until such child shall attain the age of sixteen, and all relief granted to such child . . . shall be considered as granted to such mother. . . ." She had no claim on the father of her child, and the only time he could ever be called upon to contribute to the maintenance of the child was where she was incapable of doing so and the Guardians had therefore to maintain. In a case of this kind, by the Act of 1834,[4] Guardians or Overseers could apply to the Justices in Quarter Session for an order to enforce maintenance on the putative father, "provided that no part of the moneys be paid to the mother of such bastard child. . . ." And by the same Act a man became responsible for the illegitimate child of the woman he married as though such child were his own.

1 6 Geo. II. c. 31; 49 Geo. III. c. 68.

2 Pinchbeck, Women Workers and Industrial Revolution, p. 82; Report of Poor Law Commission, 1834, p. 92 *seq.*

3 4 & 5 Wm. IV, c. 76. ss. 69 & 71.

4 *Ibid.* s. 70.

WOMAN AS OWNER OF PROPERTY

SINGLE WOMAN

The property rights of a single woman—in legal language, of a *feme sole*—were at Common Law identical with those of a man; she could dispose of it either during her lifetime or by will. But if she was betrothed to be married her rights were immediately curtailed. The property of a married woman, as we shall see, vested in her husband, and in order that his rights should not be infringed, any gift to a third person, or any settlement on herself to her separate use,[1] was void if carried out without the intended husband's consent. It was a "fraud on his marital right."[2]

MARRIED WOMAN

(1) *Rights and Ownership.* The doctrine of the union of husband and wife resulted, as far as the Common Law was concerned, for all practical purposes in making a gift of a woman's property to her husband, while it conveyed no corresponding gift of his property to her. He received all she possessed, in return for which, as we have seen, he was expected to give her maintenance and protection. But his rights varied according to the nature of her property.

A man's rights in his wife's real property, that is, in her freehold estates, were not the same as those in her personal property. Of the latter, her *choses in possession*, those goods or money in her actual possession, became, with partial exceptions, his; he could dispose of them either during his lifetime or by will. Her *choses in action*, moneys not yet paid, such as outstanding debts, rents which had accrued, promissory notes, bills of exchange, became his if he took the necessary steps to make them so, if he reduced them into possession during coverture. If he failed to do this his rights over them were gone, and on

[1] See p. 24 *post*.
[2] Strathmore *v.* Bowes, 1 V. 22.

his death she became entitled to them. Her leaseholds, known as *chattels real*, if in actual possession and, if they were capable of falling in during coverture, those in reversion too, though not absolutely his property since he could not dispose of them by will, might be sold or in any way disposed of during coverture and the resulting proceeds pocketed by him. Her freehold estates were vested in both during coverture; they were seised together in entireties, which meant that he had the right to receive all rents and profits from her freehold estates during coverture, but that neither could dispose of the property by will and neither could alienate it without the consent of the other.[1] And to make sure that the woman was not acting under coercion the Fines and Recoveries Act of 1833, following an ancient requirement, enacted that she must be separately examined before her real estates could be conveyed.[2] Husband and wife took as one person, and from this a further peculiarity followed. A gift of land to husband and wife and a third person gave, unless a contrary intention was declared, to husband and wife together but half and not to all three parties a third as it would have done to any other three beneficiaries.[3]

Any monies then to which the wife might be entitled during coverture, whether as rent for freehold or leasehold estates or in payment of her own work, or in virtue of any gift, were or could become her husband's to dispose of as he wished. To this rule there were two partial exceptions. Of her personal chattels married women might own such as were wearing apparel and personal ornaments suitable to her position in society. Such personal property was known as her *paraphernalia* and it was hers only to a very limited extent. She could not dispose of her *paraphernalia* during her life nor by will

[1] Bacon's Abr., Baron and Feme (C).

[2] 3 & 4 Wm. IV, c. 74; Bacon Abr. Fines and Recoveries (C); Baron and Feme (I).

[3] Co. Litt., Ed. 1832, 187a.

without her husband's consent. He, on the other hand, could dispose of them during his lifetime, but he could not bequeath them by will although they would be liable for his debts after his death unless other assets were forthcoming.[1] *Paraphernalia* were really a form of dower, for they did not belong to her until she became a widow, and then only subject to the conditions mentioned. A married woman might also be in possession of *pin-money*, an allowance secured to her usually in her marriage settlement, out of her husband's lands or other income.[2] But *pin-money* was a sum of money definitely assigned to her that she might keep up appearances consistent with her husband's dignity and social position; it was not hers to dispose of as she thought best, and any sum saved out of it was held to be not hers but her husband's. "The money," in the words of Lord Chancellor Brougham, "is meant to dress the wife so as to keep up the dignity of the husband . . . and as it is meant that the money should be spent for the husband's honour, to support his and her rank in society, if the *femme* did not choose to pay away the money to the *baron's* honour, she would in vain come to the Court of Chancery and pray order payment of £9,000 into my bankers for ten years; for I spent only £1,000 when it was meant I should spend £10,000."[3] These exceptions of *paraphernalia* and *pin-money* therefore, though they gave to some women a certain nominal independence, cannot be said to have secured to them much more than that.

We may notice here that a married woman could act as trustee or as executrix, but since the husband was liable for her breaches of trust, she could, it appears, do nothing without his concurrence.[4]

1 Blackstone, Vol. II, ch. xxxii.

2 See Haynes, *Outlines of Equity*. Lecture VII. The right to pin-money was not conceeded without protest. See Addison's *Spectator*, No. 295.

3 Howard *v.* Digby, 2 Cl. & F., p. 657.

4 Bacon, Abr., Baron and Feme (F) and (I), and Executors and Administrators (F); Smith *v.* Smith, Beav., xxi, p. 385.

Now in exchange for the extensive rights in the property of his wife a man, as we have seen, was supposed to maintain her. An arrangement of this kind was consistent with the general opinion of the times which regarded a woman as incapable of managing her own affairs and believed it to be in the interests of society to vest the sole authority over the family in the man. But in course of time it became obvious that in handing over a woman's property to her husband the law of England had completely failed to protect her interests. A rogue like the Barry Lyndon depicted by Thackeray or the Mantalini of Dickens' imagination could dissipate the whole of his wife's property and leave her penniless and without redress. Her property the law secured to him; it did not secure to her the benefits of maintenance.

Yet the Common Law of England suffered no change. Behind the law lay the belief that the family life of the country depended on there being one head with absolute authority. Further, it was not necessary to attempt a radical alteration. The women of the masses had no property and therefore would have derived no benefit from a change; the property of the women of the aristocracy was secured to them by means which answered the purposes and yet appeared to introduce no new principle. These means were devised by the Courts of Equity, which for some centuries had been seeking to curtail the common law rights of the husband.

Equity was a system of law which had grown up side by side with the Common Law, superseding or supplementing it, and which was administered, not in the ordinary Courts but in the Court of Chancery.[1]

We have noted that at Common Law a man had the power to reduce the wife's *choses in action* into possession, and thus bring them under his exclusive control. But it often happened

[1] *Ancient Law,* Sir Henry Maine; Snell's *Equity*; Maitland's *Lectures* in *Equity*.

that in order to do so he had to seek the assistance of a Court of Equity, in which case such a Court, acting on the principle that 'he who seeks equity must do equity'[1] might refuse to part with the property unless an adequate settlement were made on wife and children.[2] Generally, a claim of this kind was made by trustees on behalf of a married woman, usually after an application had been made to the Court by the husband but not necessarily so, for she had the right to take the first step and assert her right to her 'equity to a settlement.'[3] Her right was not a right to property, but a right to ask the Court to force her husband to act equitably.

In asserting a woman's right to a settlement out of her property the Courts of Equity made a stand on her behalf against the common law rights of her husband. But for some two centuries Courts of Equity had been seeking to curtail his rights still further, and long before 1837 they had evolved a method whereby a married woman might own her own property quite independently of her husband. For this purpose they made use of the doctrine of trusts which enabled a third person, in whom the property was vested at law, to hold it, in Equity, on trust for a married woman. In 1837 property could be set aside for the 'separate use' of a married woman, either by gift or will or by means of a contract between husband and wife, either in a marriage settlement or later.[4] Such property was in the nature of a trust, but it was early decided that it was not necessary for a trustee to be appointed and where property was given to a woman for her separate use and no trustee was appointed the Court of Equity held the husband responsible for it.[5] Yet the doctrine of separate use

1 *See* Footnote, p. 23.
2 Daniel's Chancery, 6th ed., 121; Lady Elibank *v.* Montolieu, 5 Ves., 737.
3 Lady Elibank *v.* Montolieu, 5 Ves. 737.
4 See Haynes, *Outlines of Equity*, Lecture VII.
5 Bennet *v.* Davis, 2 P. Williams—p. 316. Also Pybus *v.* Smith, 3 Bro., p. 339 note.

was probably invented not so much to enable a woman to have control over her own property as to guarantee to her father that his money should be used for her benefit and not to defray the expenses of an extravagant son-in-law. "In this country, as in Scotland, it has been found necessary for the interests of society that means should exist by which either the parties themselves by contract or those who intend to give a bounty to a family may secure that for the benefit of the wife and children without its being subject to the control of the husband."[1]

Speaking generally, the effect of making over an estate for the separate use of a married woman put her in much the same position as a *feme sole*. She could dispose of her property,[2] she could charge it with her debts, she could devise or bequeath it. Yet there are considerable differences between the two. In the first place the rights attached only to property which was definitely separate property; over her ordinary property which came to a married woman in the ordinary way her husband had his common-law rights. In the second place, her contract bound, not her personally as it bound a *feme sole* or a man, but her property. We shall consider this when we examine the contractual capacity of a married woman.[3]

Having made it possible for a married woman to own property independently of her husband, Equity next proceeded to give her a protection entirely unknown to the Common Law, a protection which put her in an extremely favourable position in one way but in another considerably curtailed her freedom of action. It was found that the method which had been adopted might be rendered quite ineffectual in safeguarding a wife's property against dissipation by her husband if he had

1 Rennie *v.* Ritchie, 12 Cl. and F., 234; See also Bennet *v.* Davies, *idem*.
2 Her right to dispose of her real property doubtful till 1865. See Taylor *v.* Meads, 34 L. J. Ch. 203.
3 Pages 31-34, *post*.

the power, by threats or persuasion to induce his wife either to charge her property with his debts or to sell it and hand the proceeds to him. It was to preclude a husband from making this use of his wife's separate property that the custom known as the " restraint upon anticipation " came into existence. It was probably due to the ingenuity of Lord Thurlow who first used it in Miss Watson's case,[1] and it gave to a married woman a protection hitherto unknown to the law and applicable in no other case. Briefly, where property was given to a married woman for her separate use but subject to a restraint on anticipation, she had no power to alienate it or to dispose of any part of her income, which was not actually in her possession or due to her. Where, therefore, a restraint against anticipation was imposed on a woman's separate estate her power of disposal during lifetime was exceedingly limited. Equity lawyers found it necessary not so much to assert the independence of woman but rather to emphasize the fact that many husbands had failed in their trust, had taken advantage of that " frailty " which they ought to have protected.[2]

DISPOSITION BY WILL

(2) *Disposition by Will.* At Common Law a *feme sole* had the same right to dispose by will of her property as a man had. A married woman could, without her husband's consent, devise or bequeath her separate property, even property which she was restrained from anticipating, but if she died intestate his ordinary rights revived. At Common Law she might make a will in respect to property over which she had a power of appointment or which she held as executrix, but she could not devise her real property even with her husband's consent, and she had over her personal property only such testamentary capacity as her husband allowed her.[3]

1 Pybus *v.* Smith, 3 Bros., 340 note 1. Haynes, *idem.*
2 cf. Parliamentary Debates, June 10, 1868. Vol. 192, p. 1357 *seq.*
3 34 & 35 Hen. VIII, c. 5; Blackstone, Vol. II., Ch. xxxii.

Widower's Rights. At her death the personal property in possession of a married woman passed to her husband, and, as her administrator, he acquired all her outstanding property after her debts had been paid. If there had been a child of the marriage born alive and capable of inheriting he was also entitled by an old custom known as the "curtesy of England" to an estate during his life in her estates of inheritance, legal or equitable, which had been in possession and of which she had been solely seised;[1] and in Kent, where land was held subject to the custom of *gavelkind*,[2] this right was recognized even though no child had been born, but it extended to a half and not to the whole of his wife's estate of inheritance. If these conditions were satisfied, if for example, only a daughter was born and the land had been conveyed to a woman and the heirs male of her body, curtesy would not attach, and a woman's real estate passed immediately to her heir or heirs. Adultery on his part did not deprive him of his right, "since there is no act inflicting . . . the forfeiture of a tenancy by the curtesy."[3]

What was the position of a widow in 1837? Of her own property, her freehold estates and her separate property were left in her possession, as also her *choses in action* which had not been reduced, while her *chattels real* and her *choses in possession* were hers if her husband had not disposed of them.[4]

Before 1833[5] a widow was entitled for life to one-third of all the lands of which her husband was solely seised in fee simple or fee tail at any time during coverture, provided she had not been guilty of adultery uncondoned by him,[6] a pro-

1 Bacon, Abr., *Curtesy of England*; Blackstone, Vol. II, Ch. viii.
2 As above, Blackstone.
3 Sidney *v.* Sidney, 3 P. Will., p. 276.
4 Bacon, Abr., Baron and Feme (C).
5 Bacon, Abr., Dower and Jointure. Blackstone, Vol. II, c. viii.
6 Blackstone, Vol. II, Ch. viii, 13 Ed. I, c. 34.

vision which we saw did not attach to his curtesy, and in Kent, by the custom of gavelkind, to one half, with the further provision that she must remain unmarried. This right was called her dower or her free bench. Before the Dower Act of 1833 many devices were made use of in order to bar the widow's right to dower,[1] but the Act of 1833 rendered them unnecessary, for it gave to a man complete power to alienate his lands unencumbered by his wife's dower.[2] The Act extended her rights in one respect, for it allowed her to claim dower out of his equitable as well as his legal estates, a right which had before been denied her, but it brought about a state of things by which she was no longer entitled to any dower at all. "No widow," the Act declares, "shall be entitled to dower out of any lands which shall have been disposed of by her husband in his lifetime or by will."

Further, unless a contrary intention had been declared by his will, after the Dower Act, "when a husband devises any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of the widow she is not entitled to her dower out of or in any land of her said husband," and "all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land is subject or liable, are valid and effectual against the widow's right to dower." The rights of a widow in her husband's freehold estates, were in 1837, therefore, of the slightest and depended entirely on his wishes. With regard to his personal property she had, if he died intestate, an absolute right where there were children to a third, where there were no children to a half, the other half going to his next of kin, or failing them to

[1] Bacon, Abr., Dower and Jointure (F). Fearne's *Contingent Reminders*, p. 347.

[2] 3 & 4 Wm. IV, c. 105.

the Crown.[1] But this right, too, could be defeated by her husband's will. One further right was guaranteed to a widow. By an old provision of Magna Carta she was entitled to "quarantine," that is, to remain in her husband's house for forty days after his death.[2]

The right of a mother to inherit from her children was far less extensive than the right of a father. Where a person died intestate and without issue his real property descended to the nearest male paternal ancestor, and only failure of all paternal ancestors and their descendants did the property come to her.[3] His personal property under similar circumstances went in its entirety to his father while his mother inherited merely her share as one of the next of kin.[4] In every other respect, however, the title of a woman to inherit property was not affected by marriage. Estates in fee simple descended to her as they descended to man, with two differences. In the first place where there were many children of the same degree males were preferred to females, and in the second place, females of equal degree inherited jointly as "coparceners," whereas an estate went in its entirety to the eldest son.[5] An estate tail, of course, descended in accordance with the terms of the instrument which created it, which most generally limited such estate to the heirs male of the body of the grantee. Personal estate descended in equal portions to and amongst the children of the intestate.[6]

POSITION WITH REGARD TO CONTRACTS AND TORTS

SINGLE WOMAN

A single woman, we have seen, had complete control over her property; she had therefore complete power to enter into a legal contract and to bind her property in any way

1 Statute of Distributions, 22 and 23, Car. II, c. 10.
2 Magna Carta, c. 7.
3 Blackstone, Vol. II, Ch. xiv.
4 1 Jas. II, c. 17.
5 Blackstone. *supra*.
6 Statute of Distributions, 22 and 23, Car. II, c. 10.

she chose, and her liability in respect to her debts was identical with man's. If judgment was recovered against her she was personally liable, she could be imprisoned for non-payment of her debts and was subject to the bankruptcy laws on the same terms as he was. If she committed a civil wrong, in legal language a *tort,* her position in nowise differed from his. In other words, she could sue and be sued in contract or in tort, according to the ordinary law of the country.

Breach of Promise of Marriage. There is one form of contract and the action to which it gave rise about which it is desirable to say a few words, namely, an action for a breach of promise of marriage. The history of such actions is interesting and worthy of a few words. Early in the Middle Ages the Ecclesiastical Courts had decided that if a man and woman pledged their troth in a certain form, by saying the words "I marry you," then, although not consummated, the marriage held good to the extent that if either party married someone else that marriage could, after many years, be declared null and void. If, on the other hand, the future tense "I will marry you" were used, then the contract was voidable, but could be enforced by the Ecclesiastical Courts. We have here one of the devices, of which we have already spoken, whereby people seeking divorce could find means of obtaining it. "A contract *in futuro,*" says Bacon, "as I will marry you . . . may be enforced in the spiritual court . . . but it hath been resolved that an action will be at Common Law [1] for the violation of such an executory contract *per verba de futuro* for the temporal loss to the party . . . it seems that by bringing an action at common law and that appearing on record, the remedy in the spiritual court is actually released; for now, in lieu of a performance of the contract he shall recover damages. . . ." Actions then could be brought if one party wished to draw

[1] Bacon, Abr., Marriage and Divorce (B).

back and damages would be assessed, according to the loss which he or she had incurred either to their worldly prospects or to their affections, and according to the means of the offending party. And the action could be brought by man or woman, for the law, it appears, did not accept the theory that marriage was an advancement to a woman but not to a man as a reason for discriminating between them.[1]

MARRIED WOMAN

1. *Right to Sue and be Sued in Contract.* The position of the *feme covert* was entirely different from that of the single woman. With few exceptions, where, for example, her husband was exiled, she had no contractual capacity at Common Law.[2] A married woman could neither sue nor be sued in contract if she was living with her husband, nor if she was living apart from him even under a divorce a *mensa et thoro*.[3] She could not during coverture make a contract as principal, but only as agent, and, as we have seen, where the contract was enforceable the husband and not the wife was liable. Nor could an action be brought against her alone, for her ante-nuptial debts. Husband and wife had to be jointly sued and this whether he had received any portion with her or not.[4] Both could be arrested, and if she had separate property she would not be discharged.[5] He incurred these liabilities in return for his rights over her property, but the liability was not a personal one and no action could be brought against him after his wife's death except as her administrator.[6] A married woman could be made bankrupt only if she traded separately from her husband according to the custom of the city of London, or if he were civilly dead or under sentence of transportation.[7]

1 *Ibid.* 2 Bacon, Abr., Baron and Feme (M).
3 Cf. Marshall *v.* Rutton, 8 Term. 545 with Corbett *v.* Poelnitz 1 T.R.9, Gilchrist *v.* Brown, 4 Term. 766 Bacon, Abr., Baron and Feme (K), (L).
4 *Ibid.* 5 *Ibid.* 6 *Ibid.* (F). 7 Bacon, Abr., Bankrupt (A).

This disability of the *feme covert* rested on her inability to own property. We shall therefore expect to find that Equity gave to her contractual capacity when it conceded the right to own property independently of her husband. And so indeed it did. "By basing the incapacities of the married woman," to quote from the *History of English Law* by Pollock and Maitland, "rather upon the fact that she has no chattels of her own than upon the principle that she ought to be subject to her husband, our lawyers were leaving open the possibility that a third person should hold property upon trust for her and yet in no sort upon trust for him. In course of time this possibility became a reality, and by means of marriage settlements and Courts of Equity the English wife became singularly free from marital control."[1]

Yet this statement ignores an important point. It assumes, as so many judgments assumed, that "the incapacities of a *feme covert* are founded not on the same grounds as those of an infant whose disabilities arise from want of discretion."[2] According to our interpretation of law and public opinion, her incapacities were, to some extent at least, due to a belief in her want of discretion, and Equity did not so much reject this belief as invent better methods for protecting her. Equity gave to a married woman the right to contract, to sue and to be sued in respect of her separate property;[3] a debt incurred on the strength of her separate property could be enforced against her by the declaration that her separate property was chargeable with the amount due. She could enter into contracts with her husband, which, being one with him, she could not do at law and she could enforce her contract. Her position in Equity had been assimilated to the

[1] Pollock and Maitland. *Husband and Wife*, Vol. II, Ch. vii. History of English Law.
[2] Corbett *v.* Poelnitz, 1 T.R. 9.
[3] Daniels Ch. Pr. 6th Ed., 137, 185.

position of unmarried woman in law. Yet her liability was different from the liability of a man or of a single woman. Even in Equity she could not sue alone but by her "next friend," and usually in an action against her her husband would be joined.[1] Further her contract bound not herself but merely her property. She charged a particular estate which was actually hers at the time the debt was incurred and any property which might come to her at a later date could not be held liable to satisfy the debt. Her liability was a proprietary and not a personal one.

The Court of Chancery, we see, in seeking to secure to the married woman rights which the Common Law denied and which justice certainly claimed for her had put her in a peculiar position, partly advantageous, partly the opposite. For, on the one hand, a creditor might find that he could not enforce judgment although the defendant actually had the means wherewith to pay; on the other hand, it made it more difficult for a married woman to enter into a contract.

Further, as we have already seen, Equity had invented the restraint on anticipation which carried the anomalous protection still further. Such a restraint made it impossible for a married woman to contract on the strength of her separate property beyond the income which was actually in her possession when the debt was incurred, so that any income paid to her a day after such a transaction would not be available for payment of her debt, and this even if she had been guilty of fraud. To quote the words of Lord Eldon: "... whether the Court will suffer the fraud of the wife to give her a power of alienation against the intention of the settlor... I am strongly inclined to think that it never could have that effect. If it were to be so held it would tend to induce husbands to compel their wives to join in a fraud."[2]

[1] Johnson *v.* Gallagher III. De G. F. & J., 494.
[2] Jackson *v.* Hobhouse, 2 Mer., 483.

2. *Right to Sue and be Sued in Tort.* Just as a married woman could neither sue nor be sued in contract unless her husband was joined, so she could not sue nor be sued alone for civil wrongs committed against or by her either during marriage or before. Her husband was responsible for her torts as he was for her ante-nuptial debts—that is to say, he had to be joined with her and judgment recovered against both. Both could be arrested and imprisoned, and if she had separate property she would not be discharged. Her full liability revived when coverture ceased, whilst his came to an end on his wife's death.[1]

3. *Right to give evidence.* The right of a married woman to give evidence was affected by the doctrine of the union of husband and wife, but only in respect to actions in which her husband was a party. And the disability was imposed not only on her but on him also. Neither husband nor wife could give evidence for or against the other.[2]

WOMAN'S POSITION UNDER THE CRIMINAL LAW

The position of woman under the criminal law differed in some important respects from that of man. Certain acts were punishable only when committed against women, others only when committed by her, and coverture might absolve the married woman from all criminal responsibility.

(1) *Offences Against the Person.* The seduction of women was, with some exceptions, not an offence either at Common Law or by Statute Law. Rape was a crime punishable by death, and under that heading was included the seduction, even with her consent, of a child under ten.[3] The seduction of a child between ten and twelve was a misdemeanour, it being presumably assumed that a child of that age was old enough to consent, but

[1] Bacon, Abr., Baron and Feme (K). (L).
[2] Bacon, Abr., Evidence.
[3] 9 Geo. IV, c. 31, s. 27.

not old enough to realize the full consequence of her act.[1] Apart from these exceptions seduction was no offence unless the girl taken away was an heiress, or there had been a conspiracy for that purpose. By Common Law, where the girl was possessed of property, "the taking away a young woman under age against the consent of her father, though it be without force and with her own consent, is certainly punishable,"[2] and the Act of 1828, which repealed the two old Acts of Henry VIII and Philip and Mary, re-enacted their provisions that forcible abduction "on account of her fortune with intent to marry or defile her" should be a felony, and abduction of a girl under sixteen without the consent of her parents or guardian a misdemeanour.[3] With regard to conspiracy between two or more people, it was held that "a conspiracy to procure the defilement of a young woman, which is an offence against good morals, is an offence at common law."[4]

It does not appear that in 1837 there were many acts which acquired a criminal character when committed by women while they went unpunished if committed by men. The offence of being a "common scold, *communis rixatrix*, for our law Latin confines it to the feminine gender," was still punishable by ducking, but it appears to have become obsolete by 1837, the last case on record being the Queen against Foxby[5] in 1704.

(2) *Offences Against Public Order.* To what extent the law discriminated between men and women with respect to offences against public order it is difficult to say. An old statute of Edward III empowered a Justice of the Peace "to take of all them that be not of good fame . . . sufficient surety and mainprize of their good behaviour towards the King and his

1 *Ibid.*
2 R. *v.* Pierson and Others. Andrews, Rep., p. 311.
3 9 Geo. IV, c. 31, ss. 19 and 20.
4 R. *v.* Mears and Chalk, 20 L.J.M.C., 59.
5 Blackstone, Vol. IV, c. xiii. Queen *v.* Foxby, 6 Mod., Rep. 11.

people . . ." [1] and according to some interpreters surety for good behaviour could be required against men as well as women, " also against common whoremongers and common whores." [2] But the exact powers and duties of the justices under this Act do not appear to have been definitely laid down,[3] and we may assume that the early years of the nineteenth century did not see a stringent application of them, at any rate not to the sexual irregularities of men. Immorality on the part of man, and at no time more so than during the reigns of the four Georges, was, in the eyes of society as a whole, a venial offence. The Vagrancy Act of 1824 did introduce the principle of distinction, for though it did not make prostitution in itself a penal offence, did give to it a criminal character. " Every common prostitute," it enacted, " wandering in the street . . . and behaving in a riotous manner may be imprisoned for one month." [4]

(3) *Effects of Matrimony on Criminal Responsibility.* Under some circumstances an act might go unpunished when committed by a woman which would be criminal if committed by a man. This was the case when certain offences were committed by a married woman in the presence of her husband, for there was a *prima facie* presumption that she had committed them under his coercion, and evidence to the contrary had to be adduced to rebut the presumption. The presumption did not apply to murder or treason, nor to offences such as brothel-keeping, since " this is an offence touching the domestic economy or government of the house, in which the wife has the principal share, and it is such an offence as the law presumes to be generally conducted by the intrigues of

[1] 34 Ed. III, c. 1.
[2] Dalton's Justices of the Peace, c. xxiii.
[3] Burns, Justices of the Peace, 30th Ed., p. 754.
[4] 5 Geo. IV, c. 83, s. 3.

the female sex,"[1] nor to offences committed in his absence nor under circumstances which made coercion impossible.[2] According to one theory the privilege was originally granted to women because the severity of the Common Law could not be tempered as it could when men were the offenders by the privilege of "Benefit of Clergy," which made it possible for all men who could read to escape capital punishment. Benefit of Clergy was extended to women in the reign of William III, and abolished altogether in 1827, but the presumption of coercion remained untouched.[3] Whatever its origin, the privilege which it afforded was consistent with the ideal of both law and public opinion, according to which the will of the wife should be overborne by that of the husband. Blackstone regarded such obedience as her duty, and thought it could be reprehensible only if she was willing to assist in the commission of some heinous crime such as murder or treason. In that case "the husband having broken through the most sacred tie of social community by rebellion against the state has no right to that obedience from a wife which he himself as a subject has forgotten to pay."[4] A wife could not be *accessory after the fact*, since it was her duty to keep her husband's secrets and to aid him by every means in her power.[5]

The doctrine of the union of husband and wife resulted in yet other modifications of the criminal law. An unlawful combination by man and wife could not constitute a conspiracy, since a conspiracy required two conspirators and they together formed but one. Nor for the same reason could a man steal his wife's property nor she his.[6]

(4) *Competency of Husband or Wife to Give Evidence.* In criminal, as in civil procedure, on account of the doctrine

1 Blackstone, Vol IV, Ch. ii. 2 *Ibid.*
3 W. & M., c. 78; 7 & 8 Geo. IV, c. 28. 4 Blackstone, *supra.*
5 *Ibid.*, Ch. iii. 6 Bacon, Abr., Baron and Feme (G.)

of the unity of husband and wife neither could give evidence in criminal proceedings taken against the other except under special circumstances, where, for example, a personal injury had been committed by one on the other.[1]

WOMAN'S PUBLIC RIGHTS AND DUTIES

The right which the constitution of England gave to every citizen independently of his position or profession, namely, the rights to personal freedom, to freedom of discussion, to petition [2] and the right of public meeting, belonged to women with the one exception to which we have already called attention and to which we need, therefore, but briefly refer. A married woman, as we have seen, could be deprived by her husband of her liberty and his marital right would be accepted as a good return should a writ of *habeas corpus* be taken out against him.

A woman could hold the highest office in the land, and as queen had the full rights of kingship.[3] She could be peeress in her own right, and, though not entitled to speak or vote, was entitled to be tried like a peer by the House of Lords or the Court of the Lord High Steward.[4]

But sovereignty in England was in 1837 no longer vested in a despotic king or queen. It was divided among certain citizens of the country who formed the electorate, and from this electorate women as a sex, married or single, were excluded. Whether or no woman did suit to the local moots in feudal times has never been definitely settled. According to the view put forward by Pollock and Maitland, she did suit by deputy where she was seised of land which owed such a duty.[5] This

1 Bacon, Abr., Evidence A. 2 Hawk, P.C., c. 46.
2 Blake Odger's *Common Law of England*. Book I, Ch. ii.
3 Mary, c. 1. 4 20 Hen. VI, c. 9.
5 Pollock and Maitland, Bk. II, c. ii. *History of English Law*.

view, as we shall see,[1] has been disputed, but be that as it may, long usage had certainly robbed her of the right had she ever possessed it, and in 1832 the Reform Act, by the insertion of the words "male person" gave statutory sanction to her disfranchisement.[2] The Municipal Reform Act of 1835, which swept away many abuses and anomalies and extended the franchise to all who paid the poor rates, placed a similar disability upon women.[3] Bentham was not averse to granting the suffrage to women though he thought it undesirable to admit them to the legislative and executive bodies;[4] but James Mill thought that the interests of women, unlike the interests of men, could be best served by vicarious representation. It was a strange irony of fate that the man whose writings had the most influence on the legislators who put the Act of 1832 on the Statute Book, was the father of the man who thirty years afterwards exerted his vast authority to secure the enfranchisement of women. "The general conclusion . . . is this," wrote James Mill in 1823, in his Essay on Government which was so powerful an instrument in the hands of democratic reformers, "that the benefits of the representative system are lost in all cases in which the interests of the choosing body are not the same with those of the community . . ." yet, having admitted that, he made the following statement: "One thing is pretty clear, that all these individuals whose interests are indisputably included in those of other individuals may be struck off without inconvenience. In this light may be viewed children, up to a certain age, whose interests are involved in those of their parents. In this light, also, women may be regarded, the interest of almost all of whom is involved either in that of their father or that of their husbands."[5]

The average man believed that to grant the franchise to

1 Page 195, *post*.
2 2 & 3 Wm. IV, c. 45.
3 5 & 6 Wm. IV, c. 76.
4 Bentham, Works, Vol. IX, Ch. xv.
5 James Mill, *Essay on Government* in "Essays," c. 8.

women would be detrimental alike to her and to the race. There was no doubt much selfishness on his part, there was certainly much prejudice, but prejudice enthroned can be removed only when experience, convincing alike reason and emotion, has proved it to be wrong. And that, as history has shown, cannot be done in a day. Certainly, as we have already noted, in 1832 no attempt had been made to do so. "The world is in a bustle," wrote Mrs. Delany, "about the American affairs, but I am no politician and don't enter into these matters. Women lose all their dignity when they meddle with subjects that don't belong to them," [1] and Hannah More held similar views. True, Mrs. Wheeler and W. Thompson [2] had replied to James Mill's article demanding the franchise for women; true Mary Wollstonecraft [3] had lived and written. But they were isolated voices crying in the wilderness, commanding no authority, receiving little attention, and the Acts of 1832 and 1835 found their way on to the Statute Book because they gave expression to the prevailing idea that citizenship was no concern of woman.

Some of the Chartists were supporters of women's suffrage, but the majority feared that to adopt it would retard the suffrage for men, and the provision which was part of the first draft did not, for this reason, find a place in the Bill, afterwards called the People's Charter, published in 1838.[4]

Yet although Englishwomen were not considered sufficiently responsible, not sufficiently intelligent, not sufficiently free from the control of their husbands to be entrusted with a parliamentary or municipal vote, they were not debarred from voting for the members of the East India Company, which,

1 W. Lyon Blease, *Emancipation of Englishwomen*, p. 48; *Strictures on the Modern System of Female Education* (1779), H. More.

2 W. Thompson, *Appeal of one half the Human Race, Women, Against the Pretensions of the Other Half, Men.* (1825).

3 *Vindication of Rights of Women* (1792), c. ix.

4 *Life and Struggles of W. Lovett*, Int. by R. H. Tawney, p. 174.

in 1837, governed India. This strange anomaly was due to the fact that the East India Company was primarily a commercial undertaking and was organised on a commercial basis, the shareholders, independently of sex, being thus entitled to a voice in its constitution and activities and therefore to a voice in the government of a great Empire.[1]

When we consider the smaller and less important areas of local government we find that women in 1837 had the rights, not merely to vote, but also to elective offices. She could, if she had the necessary property qualifications, vote in vestry,[2] and for the guardians of the poor,[3] and the offices of sexton, churchwarden and overseers of the poor might be vested in her.[4] The reasons for throwing these offices open to her are entirely consistent with the outlook of the day. "This is a servile ministerial office which requires neither skill nor understanding," was the comment in the case which decided that woman might take the office of sexton, "But this cannot determine that woman may vote for members of Parliament, as that choice requires an improved understanding."

No woman could sit on a commission of the peace nor take her place as an ordinary juror, though she might be called to sit upon a jury of matrons empannelled to decide the question of the pregnancy of a female prisoner.

RIGHT TO EDUCATION AND TO WORK

Legislation, in 1837, had hardly begun to concern itself with education, and the first grant, made in 1835, amounted to no more than £20,000. Boys and girls' schools existed which

1 "The Law relating to India and the East India Company," 1841; "A list of the names of the Proprietors of East India Stock who appear by the Books of the East India Company, qualified to vote at the General Election, 12 April, 1848," and for following years.

2 58 Geo III., c. 69. 3 4 and 5 Wm. IV., c. 76.

4 Olive *v.* Ingram, Leach Mod. Rep., VII. p. 26; King *v.* Stubbe, 11 Term. Rep., p. 395.

drew their revenue from endowments, and many of these, originally intended for girls' schools, had been alienated to the use of boys. The education of girls was, with few exceptions, deplorably bad, a state of things which is hardly to be wondered at when we recollect the ideal of womanhood for which it existed. "If you happen to have any learning," advised Dr. Gregory, in his *Legacy to his Daughters*, "keep it a profound secret, especially from men, who generally look with a jealous and malignant eye on a woman of great parts, and a cultivated understanding. . . . The men will complain of your reserve. They will assure you that a franker behaviour would make you more amiable. But trust me they are not sincere when they tell you so. I acknowledge that on some occasions it might render you more agreeable companions, but it would make you less amiable as women: an important distinction which many of your sex are not aware of."[1] In 1775 Elizabeth Montagu proposed to found and endow a college for the higher education of women, and offered the post of headmistress to Mrs. Barbauld. "A kind of Literary Academy of Ladies where they are taught in a regular systematic manner branches of science," wrote that lady in reply, "seems to me better calculated to form such characters as the Précieuses or the Femmes Savantes of Molière than good wives and agreeable companions. . . . Young ladies ought only to have such a tincture of knowledge as to make them agreeable companions to a man of sense and to enable them to find rational entertainment for a solitary hour, and should gain these accomplishments in a more quiet and unostentatious manner."[2] Mrs. Macaulay, Hannah More, Maria Edgeworth[3] did, it is true, criticize the prevailing ideal of woman's education which regarded the acquisition of accomplishments as its sole object.

[1] Quoted in *Vindication of the Rights of Women*, by Mary Wollstonecraft, Ch. v.

[2] Quoted *The Emancipation of Englishmen*, W. Lyon Blease.

[3] Letters (1790) Mrs. Macaulay. *Strictures on Female Education.* H. More; *Practical Education of Women*, Maria Edgeworth.

But they had little to offer on the constructive side, and their efforts led to no lasting improvements.[1]

As far as their entry into the professions was concerned, women had, indeed, during the eighteenth century practised in occupations which would to-day be called professional. When, however, scientific study and training became necessary conditions for entering the professions, there was no longer a place for those whose knowledge was merely empirical. In the industrial and business world, too, the changes which preceded and followed the Industrial Revolution completely transformed woman's position as a worker. Before the day of large scale production, women had taken a part in productive work, either as assistants to their husbands, or on their own account, in some domestic industry such as spinning, lace making, weaving, or as day labourers in the field. As assistants to their husbands they received no separate wages; as independent workers their wages, presumed to be supplementary, were low. The Industrial Revolution changed all this. It took industry away from the home and forced many women to work in the factory in order that they might increase the insufficient earnings of their husbands or in order to keep themselves.[2]

CONCLUSION

We have now given a brief account of the legal rights and duties of women in 1837, and of the ideal of womanhood to which they gave expression. But already the forces which were ultimately to change the face of the Statute Book were at work. For not only did the prevailing social outlook force men to remove obvious inequalities and disabilities, thus, often unintentionally, preparing the way for further changes, but

[1] Cf. *English Girlhood at School.* D. Gardiner.

[2] Cf. *Women Workers and the Industrial Revolution,* Ivy Pinchbeck, and *Working Life of Woman in the 17th Century,* Alice Clark.

the new social, political and economic conditions, of necessity, reacted on the lives and outlook of women, awakening in them needs and demands undreamed of by their mothers. Hence, though in many instances legislation and judicial decisions for some years after 1837 reflected the old ideal of womanhood, there were others which gave the first expression to a different ideal, and in the organizations which had come into existence by the middle of the century, the demands took concrete form and began the work of educating public opinion, which had to be undertaken before any real change in woman's legal position could take place.

CHAPTER II

WOMAN AS WIFE: 1837 TO THE PRESENT DAY

We have now to inquire how the rights of husband and wife have changed since 1837, and to examine some of the principles which underlie such changes.

HUSBAND'S RIGHTS[1]

(1) *Husband's Right to Wife's Consortium.* We saw in Chapter I[2] that a husband had the right to his wife's obedience, to her society and her services, the right to her *consortium*, which he could directly enforce with the sanction of law. If she left him, a writ of *habeas corpus* directed against the person with whom she was living would, with few exceptions, force her to return; if she threatened to leave him he could deprive her of her liberty, and his marital right would be a good return if a writ of *habeas corpus* were directed against him. In 1840 this right received striking confirmation. A certain Mr. Cochrane, whose wife had left him, succeeded, by means of a stratagem, in enticing her back to his home where he kept her confined in her rooms because she threatened to leave him. Mr. Justice Coleridge, before whom the case was tried, after quoting the remarks of Bacon to which we have already referred,[3] made the following comment: "A husband might be excused . . . if he felt uneasy when he learned that she had gone to masked balls at Paris with persons whom he did not know," and such uneasiness was

[1] For wife's rights, see p. 59 *post*. [2] Ch. I, p. 6. [3] Ch. I, p. 7.

sufficient justification for his action in depriving her of her liberty. Law, reflecting public opinion, held that it was in the interest of all parties that he should be allowed to "keep her within the bounds of duty", whatever her feelings on the matter might be.[1]

It is interesting to see how this conception of the relationship between husband and wife has given way to another. In the first place, to keep an adult in confinement was a gross interference with the liberty which was so dear to the English heart, and at no time more so than in the middle of last century.[2] Public opinion, therefore, became less and less prepared to tolerate an infringement of the right to dispose of one's person. In the second place, though but in its early infancy, the right of a married woman to be treated as a responsible human being was, as we shall see, beginning to be discussed. Murmurings here and there were just ruffling the surface of custom and tradition. In 1851 John Stuart Mill married Mrs. Taylor and gave a written statement of his conception of the relationship between husband and wife. "Being about, if I am so happy as to obtain her consent, to enter into the marriage relation with the only woman I have ever known with whom I would have entered into that state; and the whole character of the marriage relation as constituted by law being such as both she and I entirely and conscientiously disapprove, for this among other reasons, that it confers upon one of the parties to the contract, legal powers and control over the person property and freedom of action of the other party, independent of her own wishes and will; I, having no means of legally divesting myself of these odious powers (as I most assuredly would do if an engagement to that effect could be made legally binding on me) feel it my duty to put on record a formal protest against the existing law of marriage, in so far as conferring such powers; and a solemn

1 *Re* Cochrane, 8 Dowling, p. 630.

2 Cf. Mill on "Liberty," c. III.

protest never in any case or under any circumstances to use them. And in the event of marriage between Mrs. Taylor and me I declare it to be my will and intention and the condition of the engagement between us that she retains in all respects whatever the same absolute freedom of action, and freedom of disposal of herself and of all that does or may at any time belong to her as if no such marriage had taken place, and I absolutely disclaim and repudiate all pretence to have acquired any rights whatever by virtue of such marriage."[1]

Public opinion was not and would not be for many years ready to endorse such views, but for all that a change of opinion was noticeable in the decision given by Lord Campbell in a case tried before him in 1852. A certain Mrs. Sandilands had left her husband and he applied for a writ of *habeas corpus* directed against Mr. Leggatt, his son-in-law, with whom she was living. On behalf of the plaintiff the arguments which had done such good service before were all brought up again. "She cannot," argued counsel, "be considered to have a will apart from that of her husband any more than a child of tender years can have a will apart from its parents." But Lord Campbell refused to accept these arguments and brushed aside the *dicta* of older authorities as a wrong interpretation of the law. "A parent," he said, in giving judgment, "has a right to the custody of the child; and if it be of tender years the Court will make an order for its restoration to him. But a husband has no such right at common law to the custody of his wife."[2] The law, therefore, would no longer assist a man to enforce cohabitation, and a husband's rights over the person of his wife received their first check. Yet it was not until 1884 that the next step was taken and by that date a great change had come over public opinion.

[1] *Letters of J. S. Mill*, ed. H. Eliot. Vol I, p. 158.
[2] Rex *v.* Leggatt, 18 Q.B. 781.

On all sides woman had achieved a large degree of emancipation; the Married Women's Property Act of 1882 [1] had given to married women control over their property and an independence of marital authority undreamed of twenty years earlier. The Matrimonial Causes Act passed in 1884 gave her rights over her person which she had not before possessed. Hitherto a decree for restitution of conjugal rights whether brought by husband or wife had been enforceable by attachment of the person; it was to be so no longer. If a woman refused to comply with a decree her husband could not force her to return, and his remedy henceforward was to institute a suit for a judicial separation on the ground of her desertion without reasonable cause.[2]

This Act did not, however, dispose of a man's claim to be permitted to detain his wife by force, and the question was not settled until 1891 when a case, in essentials similar to Mrs. Cochrane's case, was heard by the Court of Appeal. Mrs. Jackson, who had refused to obey a decree for restitution of conjugal rights, had been forcibly seized by her husband as she was leaving church, and at the time of the action was a prisoner in his house. The episode caused a considerable amount of excitement. Not only was organized womanhood in 1891 ready to take up the cudgels on behalf of the rights of woman, but years of propaganda work, years of education, and, above all, the recent legislation itself with its reaction on public opinion, all operated against the acceptance of a husband's right thus to capture and forcibly detain his wife. Here and there a voice was raised, one the voice of a literary woman [3] seeking to justify Mr. Jackson's action as necessary to the relationship between husband and wife which had hitherto existed. But it was exactly this relationship which women were

1 45 & 46 Vic., c. 75. See *post*, Ch. IV.

2 47 & 48 Vic., c. 68, ss. 2 & 5; 15 & 16 Geo. V, c. 49, s. 185–187

3 Layard, *Life of Mrs. Lynn Linton*.

seeking to alter; a justification of his action was totally inconsistent with the feelings and opinions of the day.[1]

Mr. Jackson's marital right was not allowed as a good return to a writ of *habeas corpus*. The old *dicta* were brushed aside; indeed, it was held that the Common Law never countenanced the theory that such a right inhered in a man in his capacity as a husband. "If," it was contended, "he may use any violence necessary to control and keep possession of her, it follows that he may beat her. . . . The two things necessarily go together and are constantly associated in the ancient *dicta* that have been quoted. In dealing with such authorities it is impossible to throw overboard the right to beat and retain the rest of the proposition with regard to the right to imprison." Commenting on the husband's contention that he might "seize and imprison her until she consents to restore conjugal rights" Lord Halsbury said: "I am of opinion that no such right exists or ever did exist."[2]

Consortium then, by a series of judicial decisions and Acts of Parliament, the last of which is the Act of 1925, is no longer a thing that can be enforced. A man's remedy, as also a woman's, where *consortium* is denied, is to apply for a decree for restitution of conjugal rights and, if that is not complied with, then he can take no further steps to enforce the right directly. All he can do is to set proceedings on foot for a judicial separation and so enforce his rights not directly but indirectly by withdrawing from his wife the protection and support which she enjoyed.[3]

A husband may still bring an action against a third person

[1] Ibsen's *Doll's House* was first produced in England in 1889. In 1894 Mr. G. B. Shaw joined the *Saturday Review*. "Now I claim that no male writer born in the nineteenth century outside Norway and Sweden did more to knock woman off her pedestal and plant her on solid earth than I." *Ellen Terry and Bernard Shaw: A Correspondence*; Introduction, p. xiii.

[2] *R. v.* Jackson (1891), 1 Q.B. 671.

[3] The Supreme Court of Judicature (Consolidation) Act, 1925, s. 187.

who has deprived him of the society or services of his wife either by enticing her away from him or by causing her an injury and thus incapacitating her.[1] But if she dies he cannot at Common Law claim damages for the permanent loss of *consortium*, though he may do so under the Fatal Accidents Act[2] and also if her death was caused by breach of a contract made between the husband and the defendant.[3]

What constitutes an enticement on which an action can be founded was decided in 1932 by the Court of Appeal when the decision of Mr. Justice (now Lord) Darling in Sanderson *v.* Hudson in 1923 was overruled. In Sanderson *v.* Hudson the action was brought against a woman by her son-in-law for "unlawfully enticing, procuring and inciting his wife to leave him," and Mr. Justice Darling, in giving judgment, said: "Some time ago . . . if a wife merely left her husband, and somebody else received her, that would found an action. But the law had been modified, and the wife might elect to live apart from her husband . . . and . . . he must show that his wife did not elect to leave him but was overborne by a stronger will."[4] In 1932 the action was brought by a husband against another man and, in giving judgment, Scrutton, *L.J.*, said, "The decision of Darling *J.* in Sanderson *v.* Hudson has been relied upon for the proposition that the defendant in such an action as this is not liable unless the wife's will has been overborne by the stronger will of the defendant. I know of no authority for that proposition, and in my view it is erroneous. It is quite sufficient to support the action if a wife of equal

1 Masper *v.* Brown (1875), 1 C.P.D. 97; Brockbank *v.* Whitehead Railway Co. (1862), 7 H. *v.* N. 834.

2 9 & 10 Vic., c. 93, s. 1 (1846). To succeed under this Act the wife must have died, and she must have had a right of action if she had been injured and not killed.

3 Jackson *v.* Watson & Sons (1909), 2 K.B. 193, where a husband successfully claimed damages, the death of his wife having been caused.

4 Sanderson *v.* Hudson, 1923. *Times* Newspaper, Jan. 29, 1923.

will with that of the defendant is persuaded to depart from the *consortium* of the husband." [1]

Two things should be noticed about this type of action for loss of *consortium*. In the first place, it appears to be founded on the general principle of law which makes it an actionable wrong to induce, without just cause, any one to break contractual relations recognized by law.[2] In the second place the action may be brought at the suit of a wife as well as at the suit of a husband.[3] Nevertheless, the arguments in favour of its abolition are strong. It is almost impossible to say what, on the part of a third person, constitutes inducement or persuasion, if one spouse decides to depart from the *consortium* of the other in breach of the marriage contract. Certain acts, such as adultery and desertion, are regarded by the law as a withdrawal of *consortium* which gives to the injured party the right to a divorce or to a legal separation, or merely to refuse maintenance. But apart from acts of this nature, withdrawal of *consortium* carries no legal redress, and it is clearly inconsistent with the liberty of action which we to-day accept that any one should be prevented from enjoying the company of another for fear an action for inducing withdrawal of *consortium* might be brought.

The abolition of the action for enticement would not, of necessity, abolish the husband's right to claim damages for the loss which results to him from an injury done by a third party to his wife. He is deprived of her society and, since under present conditions he is responsible for her maintenance, he has usually to bear the expense of providing her with medical attendance and special nourishment and, if she takes charge of the household herself, of paying for domestic assistance. But if a wife had an income of her own, if the household money were her property and not her husband's,

1 Place v. Searle (1932), 2 K.B., p. 520
2 *Ibid, supra* per Slesser, *L.J.*
3 See p. 80 *post*.

or if she had a legal right to a part of his income,[1] then such expenses would be incurred by her and not by him. They would constitute her special damages for which she could claim. Man and wife would then be in the same position with regard to the loss each sustains by injury done to the other, and there is no case on record of a claim made by a wife. There seems to be good ground for suggesting that actions of this nature should be abolished.[2]

(2) *Husband's Right to Withdraw his Consortium.* We saw that in 1837 a man might withdraw both his support and his protection if his wife refused to live with him in circumstances which the Courts held did not justify her in living apart and, of course, if she were guilty of adultery uncondoned by him. Adultery or cruelty, but not desertion, were grounds on which a divorce *a mensa et thoro*, or "from bed and board", would be granted whilst a divorce *a vinculo matrimonii*, that is divorce as we understand the term to-day, carrying with it the right of re-marriage, could be obtained on the ground of adultery provided the petitioner had sufficient means or influence to promote a Bill in Parliament.[3]

As the law stood before 1857 it was exceedingly expensive and complicated as well as illogical. If divorce was to be permitted by the law of England, it was obvious that it would have to be made available to a wider public to meet the democratic wave which was sweeping over the country; if it was not to be permitted, then divorce by special Act of Parliament had no justification. The question had been agitating the public conscience for some time and had been brought to a head by the remarks of Maule *J.* in giving judgment in a case of bigamy at the Warwickshire Assize.[4] In 1850 a Commission

[1] p. 77 *post*.

[2] Of course, if one were, in fact, in the employ of the other, the law of master and servant would apply.

[3] Ch. I, p. 8 *ante*.

[4] Parliamentary Debates, 1854, Vol. 134, p. 14.

was at last appointed, and in 1854 a Bill to alter the divorce laws was introduced into the House of Lords. The Bill was dropped, but another was introduced in 1856, too late in the session, however, for it to go to the Lower House. Finally, in 1857, a third Bill became law. It established the Court for Divorce and Matrimonial Causes[1] which had power to decree a dissolution of marriage on the ground of a wife's adultery, provided it was neither connived at nor condoned by the petitioning husband and there was no collusion.[2] The Act also made adultery, cruelty or desertion for two years a ground for judicial separation, which from now onwards took the place of the old divorce *a mensa et thoro*.[3] The Act of 1884 added a further cause for judicial separation in non compliance with a decree for restitution of conjugal rights.[4]

The reform of the divorce laws was considered by a Royal Commission which reported in 1912, and Matrimonial Causes Bills were introduced into the House of Lords in 1920 and 1924, but were not proceeded with. Finally, in 1925, the Supreme Court of Judicature (Consolidation) Act gave us the law as it exists to-day.[5] Section 176 and 178 re-enacted sections of the earlier Act; section 176 makes a wife's adultery, provided there is no collusion and the husband neither connived at nor condoned nor was an accessory to it, a ground for divorce. The Act also re-enacts the anomaly instituted by the Act of 1857, by which an unnatural offence on the part of the wife is no ground for divorce whereas an unnatural

1 Became " The Probate, Divorce and Admiralty Division of the High Court of Justice " by the Judicature Acts 1873–75.

2 Matrimonial Causes Act, 20 & 21 Vic., c. 85, s. 27 and s. 29. In addition to the absolute bars, s. 31, laid down a number of discretionary bars. By s. 54 the Court may make regulations for enabling persons to sue in *forma pauperis*.

3 *Ibid*, c. 58, s. 16, s. 7.

4 Matrimonial Causes Act, 47 & 48 Vic., c. 68, s. 5.

5 Supreme Court of Judicature (Consolidation) Act, 15 & 16 Geo V, c. 49.

offence on the part of a husband is, though the Bills of 1920 and 1924, which failed to become law, provided that there should be complete sex equality.[1] As to what constitutes condonation, it would appear that the Courts have held since 1857, as they held before the Matrimonial Causes Act of that year, that condonation of adultery is meritorious on the part of a woman, but not on the part of a man. "Forgiveness," said Sir John Nicholl, "on the part of the wife, especially with a large family, in the hope of reclaiming her husband, is meritorious, while a similar forgiveness on the part of the husband would be degrading and dishonourable",[2] from which it follows that condonation is a defence more available to a woman than to a man.

The Act of 1925 re-enacts the provisions of the earlier Act in making adultery, cruelty, and desertion for two years and failure to comply with a decree for the restitution of conjugal rights, grounds for a judicial separation.[3]

The Acts which have made it easier for a woman to obtain

1 Matrimonial Causes Bill (1924), s. 25.

2 Durant *v.* Durant (1825), 1 Hagg, E. R., 752. In addition to those absolute bars there are also discretionary bars. Thus (s. 178), dissolution of marriage may be refused to a petitioner guilty of adultery, cruelty, desertion or neglect and misconduct. But the Court has no power to refuse a judicial separation on the ground of adultery because a petitioner was guilty of desertion. Synge *v.* Synge (1900), P.D., 180.

3 Supreme Court of Judicature (Consolidation) Acts, 1925, 15 & 16 Geo. V, c. 49, ss. 185, 186. As to what constitutes desertion or cruelty see Rayden and Mortimer on *Divorce*. Where one spouse, without just cause, refuses marital relations, and the other, for this reason, lives apart, there is no desertion on the part of the other, but there is desertion on the part of the one refusing. Synge *v.* Synge (1900) P.D. 180; (1901) P.D. 317. In order to establish a charge of legal cruelty against one spouse for communicating venereal disease to the other it is not necessary to allege or prove that it was knowingly and wilfully communicated. It is sufficient for the petitioner to prove infection, leaving it to the respondent to prove that it was not so communicated. Browning *v.* Browning (1911) P. 161. It has been held that it may be legal cruelty on the part of a husband to have intercourse against the will of his wife if both know he was suffering from venereal disease even though he does not communicate the disease. Foster *v.* Foster (1921) P. 438, overruling Ciocci *v.* Ciocci (1853) 1 Spinks 121, and pp. 86–87 *post*.

separation from her husband by giving to Courts of Summary Jurisdiction the power to grant separation orders have not, with few exceptions, been made applicable to men.[1] The Licensing Act of 1902 [2] allowed a Court of Summary Jurisdiction to grant a separation order to a man if his wife were an habitual drunkard. By the Act of 1925 [3] the taking of opium and other dangerous drugs became a ground for which a separation order might be granted, and by the same Act an order may be made if a wife is guilty of persistent cruelty to the children. At the time when the earlier Acts were introduced, the rights of a man over his wife were still so extensive that special rights had to be granted to her, but as his privileges have been curtailed and hers increased, this has led to inequalities, this time in favour of the woman. Cruelty and desertion, we have already noted, have long been grounds for a decree for judicial separation on the application of the husband, but they are not yet grounds for a separation order in a Court of Summary Jurisdiction. although the Matrimonial Causes Bill introduced by Lord Buckmaster in 1924 sought to bring about these changes,[4] which ought certainly to be made.

The Matrimonial Causes Act of 1857 abolished the action for criminal conversation which, as we saw in Chapter I, was a preliminary step, when the husband was the petitioner, to obtaining a divorce by Act of Parliament. But it conceded to the injured husband the right to claim damages from the alleged adulterer [5] and enacted that where the petition was for a dissolution of marriage an adulterer should be made a co-respondent.[6] The Act of 1925 has left these rights untouched,[7]

1 See p. 85 *post*.
2 2 Ed. VII, c. 28.
3 Summary Jurisdiction (Separation and Maintenance) Act, 1925, and 15 & 16 Geo. V *idem*.
4 Matrimonial Causes Bill, 1924, s. 18.
5 20 & 21 Vic., c. 85, s. 33 6 *Ibid* s. 18
7 Supreme Court of Judicature (Consolidation) Act, 15 & 16 Geo. V, c. 49, ss. 177, 189.

and has given to the Court the power to "direct in what manner the damages recovered . . . are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife." The principles on which damages are assessed have been laid down at different times. "All the law permits a jury to give," said Sir James Hannan in 1886, "is compensation for the loss which the husband has sustained. . . . If it is proved that a man has led a happy life, . . . that she has taken care of his children, that she has assisted in his business, and then some man appears . . . and seduces the wife away . . . the jury will take those facts into consideration. The question is . . . whether or not these losses have been cast on the husband by the action of the co-respondent." [1] In 1899 Sir Henry Jeune, after saying that the breaking up of the home was the main ground for damages, called attention to the fact that it was not the only ground, and said, "It is a matter for consideration whether a man whose wife had been seduced by another man has not been subjected to intolerable insult, and the fact that he was already parted from his wife at the time when the adultery was committed does not render the blow to his honour less acute." [2] In 1922 Sir Henry Dukes laid it down that ignorance of the fact that the woman was a married woman "is no bar to an award for damages. The fact of knowledge is an aggravation, . . . absence . . . is no bar." [3] Damages in matrimonial causes cannot be claimed by an injured wife against a woman respondent, and it is arguable that, in these cases, also, a claim for damages should no longer be maintainable.

A co-respondent against whom adultery is established may be ordered to pay the whole or any part of the cost of the

1 Keys *v.* Keys and Maxwell (1886), 11 P.D., p. 100.
2 Evans *v.* Evans (1899), P. p. 195.
3 Smith *v.* Smith and Reed (1922) P. 1.

proceedings.[1] The Act of 1857 left the matter in the discretion of the Court, but a number of cases soon laid it down that a co-respondent should not be condemned in costs unless he was proved affirmatively by the petitioner to have known that the respondent was a married woman. But recently it has been laid down that it is not invariably necessary for the petitioner, who, in any case, is put to the expense of instituting proceedings, to prove this. The Court may condemn the co-respondent in costs even though the petitioner has not proved that the co-respondent knew the respondent was a married woman.

(3) *Husband's Right to Maintenance.* We saw in Chapter I[2] that in 1837 a man had no claim on his wife for maintenance. She had no property out of which she could maintain him since, with few exceptions, her property was vested in him. We shall have to consider the changes which have taken place in respect of a man's right in the property of his wife in detail in a later chapter[3] and we need here but note that the Married Women's Property Act has deprived him of all claims on it. But he has during marriage no direct claim on her for maintenance, and her only liability is to the Poor Law authorities should he become chargeable.[4] The Matrimonial Causes Acts of 1857 to 1884 did, however, give the Court power to order a settlement if a wife was possessed of property of a certain kind, for the benefit of her husband and children,[5] and the Act of 1925 re-enacts these provisions.[6] Further, a woman having separate property who has unsuccessfully brought or

1 15 & 16 Geo. V, c. 49, s. 50.
2 Smith *v.* Smith and Reed, *supra.*
3 Ch. IV, *post.*
4 Married Women's Property Act, 45 & 46 Vic., c. 75, s. 20, now Poor Law Act, 20 Geo. V, c. 17, s. 14.
5 20 & 21 Vic., c. 85, s. 45; 23 & 24 Vic., c. 144, s. 6; 22 & 23 Vic., c. 61, s. 5; 41 and 42, Vic., c. 19, s. 3. See now ss. 191, 192 of 15 & 16 Geo V, c. 49.
6 Supreme Court of Judicature (Consolidation) Act, 15 & 16 Geo. V, c. 49, ss. 191, 192.

defended proceedings in the Divorce Court may be ordered to pay her husband's costs and left to bear her own, though an order is not made unless she has adequate means of subsistence.[1]

A widower's rights of inheritance will be discussed later.[2]

The question as to whether or no a woman should to-day be liable for the maintenance of her husband raises the wider question of the economic relationship between man and wife. If a woman is to have a claim on her husband in virtue of her marital relationship, does not equity demand that if she has property of her own he shall likewise have a claim on her? Women to-day own their own property; many of them enter the labour market where they are demanding the same opportunities and payment as their husbands. In a state of society where these conditions prevail men and women should have the same duties; either each must be dependent on the other or each must be responsible to the same extent for the other. The difficulty arises from the fact that many women do not earn their own living and that the social ideal is against their doing so. Indeed under the present social arrangements a man is expected to work in the outside world where he is earning money, a wife to remain in the home where she is earning nothing. We find this point of view embodied in the Bill introduced into the House of Lords by Lord Buckmaster in 1924 but not proceeded with. That Bill, after stating that the Court should have power to make a maintenance order on the application of a husband if it is satisfied that the defendant wife has "wilfully neglected to make reasonable maintenance for the applicant," continued: "provided that the Court shall

[1] Clark *v.* Clark and Saldji (1906), p. 331; Campbell *v.* Campbell (1920) S.C. 31. Even if the property is subject to a restraint upon anticipation if she instituted the proceedings. Married Women's Property Act (1893) 56 & 57 Vic., c. 63, s. 21.

[2] Ch. iv, *post*. A widow apparently is still under no obligation to pay her deceased husband's funeral expenses, though she may enter into a contract to do so. See *English and Empire Digest*, Vol. 7, p. 524.

not make maintenance order on the application of a husband unless he is incapable of earning a livelihood[1] . . ." We deal with this subject more fully later on.[2]

WIFE'S RIGHTS

What then of the evolution of woman's rights against her husband? What new rights have been given to her, what rights have become real through being made enforceable in a Court of law, what new rights are demanded to-day?

(1) *Wife's Right to Maintenance.* And first as to her rights to maintenance. The right of a wife to pledge her husband's credit would appear to have decreased rather than increased since 1837, and that in different ways.

We have seen,[3] that while they were living together a woman in 1837 was presumed to have her husband's authority to contract on his behalf for necessaries suitable to his means and estate unless some act of his had rebutted the presumption. Yet, although no case is reported which lays it down that a man by the mere fact of cohabitation held out his wife as his agent, so that notice of prohibition had to be given to a tradesman by a husband who wished to rebut the presumption of liability,[4] yet it was not till 1864 that it was definitely laid down that this need not be done. "The question is raised," said Erlec, *C.J.*, "whether the wife had authority to make a contract binding on her husband for necessaries suitable to his estate and degree, against his will and contrary to his express order to her, although without notice of such order to the tradesman. Our answer is in the negative. We consider that a wife cannot make a contract binding on

1 Matrimonial Causes Bill, 1924 (H.L.) s. 19.
2 See p. 74 *post*.
3 See Ch. i, p. 8 *ante*. Cohabitation is still enough.
4 *Smith's Leading Cases*. Vol. 2, R.T.I., and Ch. i, p. 9 *ante*.

her husband unless he gives her . . . authority to do so. We lay down this as the general rule premising that the facts do not raise the question what might have been the rights of the wife either if she was living separate without any default on her part towards her husband or if she had been left destitute by him." [1]

Again, it has only recently been clearly laid down that the payment of an adequate allowance did relieve a husband of his liability for necessaries. Indeed, there are *dicta* to the effect that an allowance without notice of prohibition to a tradesman is not enough.[2] To-day the contrary view is held to be a correct interpretation of the law. In May of 1922 McCardie *J.* thus enumerated the factors which negative a husband's liability:—(1) That he expressly warned the tradesman not to supply goods on credit; (2) that the wife was already supplied with a sufficiency of articles in question; (3) that the wife was supplied with sufficient allowance or sufficient means for the purpose of buying the articles without pledging the husband's credit. "In my opinion her authority was equally absent if the husband made a fixed allowance even though he did not expressly prohibit the wife from pledging his credit". But the allowance, apparently, must be sufficient, and if a husband and wife, during a temporary separation due to his vocation, enter into an agreement that, in consideration of her supporting herself, he will make her an annual allowance, such agreement "is not a legal contract but an ordinary domestic arrangement which cannot be sued upon . . ." "If," said Warrington *L.J.*, "we were to imply such a contract in this case we should be implying on the part of the wife that whatever happened and whatever might be the change of circumstances while the husband was away she should be content with this £30 a month

[1] Jolly *v.* Reece, 15 C.B. (N.S.) p. 628; and Debenham *v.* Mellon (1880), 6 App. Ca. p. 24.

[2] March *v.* Ruddock, 1 H. & N. p. 601; Seaton *v.* Benedict, Bing. Rep. p. 28; Johnston *v.* Sumner, 3 H. & N. p. 261.

and bind herself by an obligation in law not to require him to pay anything more; and on the other hand, we should be implying on the part of the husband a bargain to pay £30 a month for some indefinite period, whatever might be his circumstances."[1] (4) That the husband expressly forbade his wife to pledge his credit; (5) that the order, though for necessaries, was excessive . . . "but," he added, "it was obvious that the above propositions must be taken subject to the proviso that if the husband, though cohabiting with his wife, neglected to supply her with actual necessaries of life, were they food or garments or medical attendance, she would have a right which had been called 'a special agency of necessity' to pledge his credit for . . . such necessaries."[2]

It follows that anyone who gives credit to a married woman does so at his own risk. She may have separate property and be entering into a contract not as an agent of her husband but as principal. In that case the creditor has his remedy against her as he would have against anyone else.[3] But if she seeks to make her husband liable notice of prohibition to pledge his credit need not be given to the tradesman by the husband in order to negative her authority to do so unless the husband has, by his acts or conduct as, for example, if he pays bills incurred by her,[4] given cause for the contrary belief, when the ordinary rules of agency apply and notice of revocation must be given. The one exception to this is her right as "agent of necessity", where in the words of McCardie *J*. "her husband refuses her the necessaries of life,"[5] or in the words of Rowlatt *J*. "he is bound to provide her with necessaries, and if he purports to

1 Balfour *v*. Balfour L.R. (1919) 2 K.B. p. 575.

2 Gray *v*. Cathcart, 38 T.L.R. 562. See also Morel *v*. Westmoreland (1903) I. 16 B., p. 64 and (1909) H. C., p. 11.

3 See Ch. iv, *post*, and Callot *v*. Nash, 39 T.L.R., p. 291.

4 Debenham *v*. Mellon *ante* per Thesiger *L.J*.

5 Gray *v*. Cathcart *ante*.

withdrew her authority and she is not otherwise provided for, she may pledge his credit against his will".[1]

Where neither warning nor prohibition nor an allowance nor an adequate supply of the articles in question is set up to rebut the presumption of liability, a man is responsible for his wife's contracts for necessaries and he and not she must be sued,[2] and this is so even though she be possessed of private means of her own. In 1922 it was laid down by Rowlatt *J.* that "the mere fact that the wife has an income does not negative her power to pledge her husband's credit for necessaries."[3] And in 1923 it was said by McCardie *J.*, "the law draws no distinction between a wife with a large income and a wife with no income at all. The contrast of an affluent wife and an indigent husband is preserved. The wife may accumulate all her income and throw the whole burden of her keep on her husband".[4] This last mentioned case gave rise to a discussion in Parliament and to a suggestion that an inquiry into the whole question of a husband's liability for the contracts of a wealthy wife should be made.[5] But this point can hardly be considered as an isolated fact, but rather as an integral part of an inquiry into the whole question of a wife's economic position, a subject to which we shall return later.[6]

On the question as to what are *necessaries* for which a wife is presumed to have her husband's authority to pledge his credit the law has undergone little change. "Necessaries," said Willis *J.*, "are articles really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confined to the management of the wife."[7] "An

1 Seymour *v.* Kingscote, 38 T.L.R. p. 586.
2 Paquin *v.* Beauclerk (1906) A.C. p. 148.
3 Seymour *v.* Kingscote *ante*.
4 Callot *v.* Nash, 39 T.L.R. p. 291.
5 Parliamentary Debates, March 27, 1923, Vol. 162, p. 324.
6 p. 74 *post*.
7 Phillipson *v.* Hayter, 6, C.P., p. 38.

earl," said McCardie J., "could limit the standard of the countess to the expenditure of a shooting lodge or the economy of a suburban bungalow." [1]

Furthermore, it was laid down in 1918 that there is no liability on a husband to give to his wife the apparel which he provides for her. He may give it to her, as, of course he usually does, but he may retain the right to dispose of it, she wearing it during his pleasure.[2]

When husband and wife are living apart it depends on the ground of the separation whether or no the wife has authority to pledge her husband's credit. It will be remembered, in the first place, that when living apart there was no presumption of authority,[3] and this is still so to-day. But it was laid down in 1917 that this does not apply if the separation is temporary and due, not to disagreement, but to the husband's vocation taking him abroad.[4]

A wife's right to contract as agent for her husband where the parties are separated by mutual consent was considered in 1814 in a case in which a husband agreed to make his wife an allowance, which however was not fixed in amount, and it was held that under an agreement of that nature a wife had the right to pledge her husband's credit if the amount she received was regarded by a jury as insufficient according to the degree and circumstances of the husband. "Sufficiency," said Lord Ellenborough, "is not proved by the acquiescence of the wife . . . otherwise a husband might be discharged on proof of forty shillings a year." [5] In 1878 somewhat similar circumstances were considered, with the difference that in this case there was an agreement between husband and wife that he should make her an allowance of a fixed amount, and she was held not to have the right to contract on behalf of her husband. "Where,"

1 Gray *v.* Cathcart *ante.*
2 Rondeau, Legrand and Co. *v.* Marks (1918) 1 K.B. p. 75 C.A.
3 See Ch. I, p. 60.
4 Travers *v.* Sen. 33 T.L.R. p. 202.
5 Hodgkinson *v.* Fletcher, 4 Camp. p. 70.

said Lush *J.*, "the parties separate by mutual consent they may make their own terms; and so long as they continue the separation these terms are binding on both . . . and no third person can claim to disturb the arrangement. . . ."[1] This decision does not of necessity offset the earlier decision, since the circumstances were different, but it is interesting to notice the change in outlook between 1814 and 1878 as to the woman's ability to look after her own interests.

Yet other circumstances were considered in a case heard in 1858 when it was laid down that where husband and wife separate by mutual consent, without making an agreement, and she has no adequate means, the inference is that she has his authority to pledge his credit; but if she is adequately provided for either by her husband or in some other way, then the tradesman must show an authority either express or implied before he can make the husband liable.[2]

Where a man deserted or, without justification, turned his wife out of doors, or where she left him on account of his actual or feared violence she had, in 1837, an irrebuttable right to pledge her husband's credit, she became "an agent of necessity," unless adequate provision were made for her.[3] But where she left him against his will, and without justification, she could no longer make use of his authority. Adultery on her part justified a man in turning his wife out of doors, and still justifies him in so doing unless it has been condoned or connived at by him. It was laid down in 1887, apparently for the first time, that the adultery of a wife connived at by the husband is no justification for turning her out of doors and preventing her from pledging her credit.[4] But a married woman not guilty of adultery who leaves her husband without justification, though not entitled to pledge his credit while away, is

1 Eastland *v.* Burchell (1878) 3 Q.B.D., p. 432.
2 Johnstone *v.* Sumner, 3 H. & N., p. 260.
3 Bacon's Abridgement, E. Baron and Feme H.; Ch. I, p. 12; and Houliston *v.* Smyth, Bing., p. 377.
4 Wilson *v.* Glossop, R. (1888), 20 Q.B.D., p. 354.

entitled to return, in which case, it was laid down by Lord Reading in 1920, the husband would be bound to maintain her.[1]

Desertion has been defined many times since 1837 and includes the case of a wife leaving home on account of her husband's misconduct, his constructive desertion then making her an agent of necessity unless she is adequately provided for.[2]

How far a woman capable of or actually earning her own living who has been deserted by her husband has the right to pledge her husband's credit seems to be a matter of uncertainty. Already in 1828, as we have seen, it was held by Tenterden J. that if a woman had actually supported herself during separation she had later no claim upon her husband for support.[3] In 1858 Chief Baron Pollock said, "If the husband turns his wife away it is not unreasonable to say that she has an authority of necessity . . . but we should hesitate to say that if a labouring man turned his wife away, she being capable of earning and earning as much as he did."[4]

In 1858 law could afford to be uncertain on this matter for few women were earning their own living, but in an age in which many women are capable of earning their own livelihood, more than a theoretical interest attaches to it.

A wife may pledge her husband's credit for solicitor's costs provided the solicitor acts on reasonable grounds and she is not guilty of adultery. The solicitor cannot recover if adultery on her part is proved.[5] Nor has a woman who is in receipt of alimony authority to bind her husband though the authority revives if the alimony is not paid.[6]

Thus far we have considered the rights of a married

1 Jones *v.* Newtown and Llanidless Guardians (1920), 3 K.B., p. 381.
2 Sickert *v.* Sickert, L. R. (1899), P. p. 278.
3 Warr *v.* Huntley, 1 Salk, p. 118.
4 Johnson *v.* Sumner, 3 H. & N., p. 260.
5 Michael Abrahams & Co. *v.* Buckley, L. R. (1924), 1 K.B., p. 903; Wright *v.* Webb, L.R. (1930).
6 20, 21 Vic., c. 85, s. 26. Now 15 & 16 Geo. V, c. 49, s. 194. In *re* Wingfield & Blew (1904) 2 Ch., p. 665

woman to enforce maintenance by means of pledging her husband's credit, and we have seen that her authority has been somewhat curtailed since 1837. There are good grounds for contending that her rights in that direction should be further curtailed rather than extended,[1] and her maintenance provided for by methods at once more satisfactory and dignified.[2] But the right of a married woman who is separated from her husband to enforce maintenance by means of Court orders has been considerably extended since 1837. At that date a married woman whose husband deserted her or refused to maintain her, and who was not in a position to pledge his credit, had no means of enforcing maintenance. All she could do was to go to the workhouse, and the authorities could claim the amount of her keep from her husband and, if he had the means, punish him should he fail to comply.[3]

The first step towards a different conception was taken in 1857 when the Divorce Act of that year, to which we have already referred, enacted that a judicial separation should give a married woman control over her property, and that either the new Matrimonial Court or Courts of Summary Jurisdiction might make orders for the protection against her husband or his creditors of the property of a woman deserted by her husband.[4] The Act also gave to the Matrimonial Court the power to make provision for a wife, called maintenance where the decree was for dissolution of marriage, permanent alimony where the decree was for judicial separation, and alimony *pendente lite* or *pending suit* where the allowance was made to enable her to live during the progress of the suit.[5] The Matrimonial Causes Act of 1859 gave further powers to the Court in that it might inquire into the existence of the ante-nuptial

1 P. 78 *post*.
2 P. 78 *post*.
3 Ch. 1, p. 12 *ante*
4 20 & 21 Vic. c. 85, s. 21 and s. 25; See s. 194 of 15 & 16 Geo. V, c. 49 and s. 2 and Sixth Schedule, p. 85, *post*.
5 *Ibid*. s. 32, s. 6, now s. 190 of 15 & 16 Geo. V, c. 49.

and post-nuptial settlements and order the property to be applied for the benefit of wife and children.[1]

But it was not until 1878 that legislation at last took up the cudgels on behalf of that large section of women who had neither property nor earnings. The Matrimonial Causes Act of that year gave to Courts of Summary Jurisdiction the power to grant a separation order with maintenance to a woman whose husband had been convicted of an aggravated assault upon her.[2] This Act was more designed to protect a woman against a cruel husband than to secure maintenance, and we shall consider it under that heading.[3] But in that it provided that an order could be made against him, it recognized his responsibility to support her under such circumstances.

The question of the economic position of married women was naturally one which engrossed the attention of those women who were working for the emancipation of their sex. On the whole, though they worked hard to secure to women higher wages, better conditions of employment, entry into the professions, most women did not contemplate that men should be relieved of their duty to maintain their wives and families. Miss Parkes, writing in 1862,[4] says: "But I never wished or contemplated the mass of women becoming wage earners . . . we are passing through a stage of civilization which is to be regretted . . . her home and not the factory is a woman's happy and healthful sphere . . ." An article in the *Englishwoman's Review* of 1867, discussing the Married Women's Property Bill which was then about to be introduced, urged that men should be forced to maintain their wives: "A wife would practically gain the power of choosing whether to be supported by her husband or to retain her own

[1] 22 & 23 Vic. c. 61, s. 5, now s. 192 of 15 & 16 Geo. V, c. 49.
[2] 41 & 42 Vic. c. 19, s. 4. [3] Page 31 *post*.
[4] *Englishwoman's Journal*, 1862, Vol. IV, p. 341.

earnings."[1] In 1871 we find the same journal busy collecting signatures for a memorial to be presented to the President of the Poor Law Board in favour of introducing legislation which would give to a deserted wife the power to enforce maintenance,[2] and to the writings of Miss Cobbe the provision dealing with this subject in the Matrimonial Causes Act of 1878 were largely due.[3] In the pages of the *Women's Union Journal* (the organ of the first women's trade union, the Women's Provident and Protective League) a discussion on the economic position of women was begun by Ruskin: "I have entire sympathy with the motives which urge the present endeavours to enable women to obtain due wages . . . but they are complicated with the infinite error of endeavouring to make the sexes independent . . . men of a country must maintain their women or they are worse than beasts."[4] To which the editor made the following reply: "The maintenance of all women by men advocated by Mr. Ruskin seems to be very far from possible at present, but the question of whether it would be beneficial if brought about might be usefully considered."

The Act of 1878 was followed in 1884[5] by the Matrimonial Causes Act which enacted that where a suit for restitution of conjugal rights was brought by a wife the Court might decree maintenance, and in 1886 by the Maintenance of Wives (Desertion) Act,[6] which gave to magistrates the power to grant maintenance orders to women whose husbands were guilty of desertion and neglect to maintain for a weekly amount not exceeding £2.[7] In 1895 the law was consolidated in the Summary Jurisdiction (Married Women) Act[8] which yet further extended a married woman's rights to enforce main-

1 *Englishwoman's Review*. 1867, No. IV, p. 275. 2 Ibid., Jan. 1870.
3 *Contemporary Review*, 1878, *Wife Torture in England*.
4 *Women's Union Journal*, No. 2, p. 1.
5 47 & 48 Vic. c. 68, ss. 2 and 5, and 15 & 16 Geo. V, c. 49, ss. 185, 187
6 49 & 50 Vic. c. 52.
7 In fixing the amount the income of both parties must be considered.
8 58 and 59 Vic., c. 39. See page 86 *post*.

tenance, and in 1902 and again in 1925 yet other grounds for obtaining a maintenance order were added.[1] By the Act of 1920 a weekly payment of 10*s.* for each child in the wife's custody may be ordered.[2] In 1920 the machinery by which the Acts were enforced was considerably improved by an Act of that year which gave powers to facilitate the enforcement in the United Kingdom of maintenance orders, judgments and awards made in other parts of His Majesty's Dominions and Protectorates and *vice versa*.[3]

Maintenance orders are enforced in the same way as affiliation orders are enforced.[4] They may be varied or discharged on the production of fresh evidence.[5] The Court's power to attach income or pension appears to be in doubt, but it may issue a distress warrant and in default of distress may order that the man be imprisoned. All arrears are discharged by imprisonment and, unless the Court otherwise order, no arrears accrue during imprisonment.[6] A man may thus deliberately withhold payments and wipe out his indebtedness entirely. The provisions in respect of imprisonment have been greatly criticized of recent years, both by reformers who desire to abolish all imprisonment for non-compliance with a Court order to pay a sum of money, and by those who object to imprisonment extinguishing a husband's liability to pay, which they regard as a serious injustice to many women.

In 1922 and 1923 Bills were introduced to give effect to this and to other reforms.[7] Neither Bill was successful, but the Home Secretary in June 1933 appointed a committee "to examine the question of imprisonment for debt,"[8] and the

[1] 2 Ed. VII, c. 28, s. 5; 15 & 16 Geo. V, c. 51, and *post* p. 86.
[2] 10 & 11 Geo. V, c. 63. [3] *Ibid*, c. 33.
[4] Summary Jurisdiction (Married Women) Act, 1895, s. 9; Criminal Justice Administration Act (1914), 4 & 5 Geo. V, c. 58, s. 30.
[5] Adultery, unless caused by his neglect to pay, discharges the order, but one for custody and payment for children may be made.
[6] 4 & 5 Geo V, c. 6; 4 & 5 Geo V, c. 58, ss. 32, 37; 35 & 36 Vic. c. 65, ss. 4 and 9. Robson *v.* Spearman (1820) 3 B. and Ald. p. 493.
[7] 12 & 13 Geo. V, Bill 226, and 13 & 14 Geo. V, Bill 127.
[8] *Manchester Guardian*, June 24, 1933. See Appendix.

Summary Jurisdiction (Separation and Maintenance) Act of 1925 [1] has extended a married woman's right to maintenance in that she need no longer leave home before applying for an order. But the order is not enforceable so long as she resides with her husband and ceases to have effect if she continues to live with him for three months after it is made. Furthermore, if a wife resumes cohabitation the order ceases to have effect on the resumption of such cohabitation. Many people feel that the present Act does not go far enough, and that a wife should be entitled to maintenance whilst residing with her husband or after having resumed cohabitation. This reform, they contend, would carry to its logical conclusion the principle that a man should support his wife, by giving her the means to enforce it. Once that principle is admitted, it is contended, there is no reason why the infringement of the right should not carry with it its appropriate remedy; to force a woman who merely seeks maintenance to leave her husband and her home is to deprive her of one right in order that she may have another,[2] and is not consistent with the general principle of law which regards with disfavour anything that facilitates the separation of husband and wife. Nor can the intrusion of law into the privacy of the home be any longer regarded as a thing intrinsically wrong since it is recognized that unless all the rights are to be vested, as of old, in one member of the family there must exist an impartial tribunal to whom disputes may be referred. True, the further application of this principle is still strenuously opposed, as we shall have occasion to see, but we may safely assert that the tendency of the day is towards greater equality, and that cannot be achieved without the interference of law.

In matrimonial suits maintenance may now be granted

[1] Summary Jurisdiction (Separation and Maintenance) Act (1925) 15 & 16 Geo. V, c. 51, s. 2.

[2] Evidence of Mrs. Hubback, p. 19. Cf. Sir C. Biron, p. 3, before Committee on Guardianship of Children's Bill, 1923. Cf. p. 101 *post*.

under the Supreme Court of Judicature Act of 1925 on the same conditions as it was granted under the earlier Acts. "(1) The Court may . . . on any decree for divorce or nullity of marriage, order that the husband shall . . . secure to the wife such gross sum of money or annual sum of money for every term not exceeding her life as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable.

"(2) The Court may . . . either in addition to or instead of an order under (1) direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum . . . as the Court may think reasonable," with provisos that the amount may be modified or even discharged should he be unable to make payments, or increased if the Court is satisfied that the means of the husband have increased.[1]

The provisions enabling the Court which has pronounced a decree for divorce or nullity of marriage to inquire into ante-nuptial and post-nuptial settlements, and order the whole or any part of the property to be applied for the benefit of the parties or of the children have also been re-enacted.[2] Where a decree for restitution of conjugal rights has been obtained by a wife "the Court may . . . order the respondent to make to the petitioner such periodical payments as may be just" in the event of the decree not being complied with, and "the Court may . . . order that the husband shall . . . secure to the wife the periodical payments . . ."[3] But where a decree for judicial separation is made, on the application of the wife, the Court may make such order for alimony as the Court

[1] 15 & 16 Geo. V, c. 49, s. 190. This order is usually so made that an increase in the wife's means may also be taken into consideration. Turk. *v.* Turk. (1931) P. 116.

[2] *Ibid.* s. 192. See p. 57 *ante*.

[3] 15 & 16 Geo. V, c. 49, s. 187.

thinks just.[1] It is a working rule where a decree for judical separation is granted to a wife, as it was in the days when the Ecclesiastical Courts pronounced a decree of divorce *a mensa et thoro*, that one-third of the joint income will be allowed to a wife on her successful petition, but "the Court . . . must have regard . . . to his earnings in previous years and to the probable earnings in the future . . ."[2] and to the amount of the wife's separate property.[3] The Court, it appears, has full discretion to order maintenance or alimony to a guilty wife and will do so "if the wife is entirely without means and unable to earn her living".[4] Decrees and orders in matrimonial causes are enforced by means of writs of various kinds, including a writ of attachment for contempt and by committal orders.[5] The Court has also absolute discretion with regard to the costs of a matrimonial suit, and a husband has usually to find security for his wife's costs to enable her to bring or defend proceedings. In earlier days it was essential that an order should be made, since a married woman had, of course, no means of her own, but as Hill *J.* pointed out in 1928 "the main object of security . . . is that justice may be done by the woman being able to procure the assistance of solicitor and counsel and come to court. The old basis for the rule, namely that all the wife's property on marriage passes to the husband and therefore the husband alone can foot the bill, has gone, and now you must consider whether in the circumstances the wife can foot the bill."[6]

The woman who is made respondent in a divorce petition may be ordered to pay the petitioner's costs, but such order

1 *Ibid.* s. 190. This may also be made where a decree for restitution is pronounced. An alternative cannot be secured when given under this sub-section.

2 Sherwood *v.* Sherwood (1929), P. p. 120.

3 Rawlins *v.* Rawlins (1865), 34 L.J.P. p. 147.

4 Ashcroft *v.* Ashcroft and Roberts (1902), p. 270.

5 Matrimonial Causes Rules, 1924.

6 Williamson *v.* Williamson (1929) P., p. 114.

will be made only against her separate estate if the respondent is a married woman.[1]

Of a widow's rights of inheritance we shall speak later.[2]

There is thus a tendency towards increasing the rights of a married woman to enforce maintenance at the hands of her husband, and the converse of this is seen in the Civil Service Regulations and Municipal By-Laws which require the resignation of women on their marriage.[3] It is also seen in the special provisions enacted in respect of married women under the Unemployment Insurance (Anomalies) Regulations 1931.[4] Under section 4 of the Regulations a married woman who has not made the necessary contributions has to prove in addition to what has to be proved by a man "that having regard to all the circumstances of her case and particularly to her industrial experience and the industrial circumstances of the district in which she resides either (a) she can reasonably expect to obtain insurable employment; or (b) her expectations of obtaining insurable employment in her usual occupation is not less than it would otherwise be by reason of the fact that she is married." No doubt there were many women drawing benefit who were not sincerely looking for work. But this must also be true of many men and single women; the difference is that married women who lose their work are presumed to be leaving the labour market and must prove that they are not, unless under

[1] Pepper *v.* Pepper and Baker (1926) 43 T.L.R.

[2] Ch. iv, p. 144 *post*. A husband is liable for the funeral expenses of his deceased wife even though he paid her an adequate allowance, perhaps even if she had separate property, even if she was separated from him and buried without his knowledge. Bradshaw *v.* Bradshaw (1862) 12 C.B. (N.S.) p. 344. But a husband who is his wife's executor may retain out of her estate the expenses of her funeral.

[3] Woman in the Civil Service, Cmd. 1116.

[4] Unemployment Insurance (Anomalies Regulations) Statutory Rules and Orders, 1931, No. 818. A married woman who leaves industrial work cannot become a voluntary contributor under the National Health Insurance Acts, though many attempts have been made to bring her in. See *Times* Newspaper, October 31st, 1911. pp. 10 and 13.

exceptional circumstances. These exceptional circumstances were recognized after the attention of Parliament had been called to them, and a married woman whose husband is incapacitated from work or is unemployed and not in receipt of benefit was excluded from the scope of the section.[1]

Yet the law apparently is still undecided on the question as to whether married women who can keep themselves should have a claim on their husbands for maintenance.[2] Some married women earn their own living and some do not, and we have to ask ourselves whether or no it is desirable that a man should support his wife, and, if so, in what manner.

The first thing we have to realize is that the present position is regarded by many men and women as unsatisfactory and undignified; the second thing we have to realize is that many, and a growing number of women are demanding economic independence as a necessary condition for the development of personality.

Men to-day are demanding greater economic liberty and greater economic security; many object to their present dependence on the will of an individual employer, and on all hands attempts are being made and experiments carried out that these demands may be met. And women, too, are asserting that some sort of economic independence is a necessary condition of a "good life". The view put forward by Rousseau, to which we have referred, is utterly repugnant to them. For, in the words of the German jurist Von Jhering, who expressed the matter with great lucidity: "A favour must be asked for with reserve, with tact . . . it has its moods, its humours and its antipathies; it may turn away . . . at the time and in the circumstances

[1] Parliamentary Debates, 1931. Vol. 255. pp. 667 and 1345.

[2] See p. 10 *ante*. It has been held that where a wife was intermittently employed as a supply teacher the circumstances justified the making of an order for £2. Stephenson *v.* Stephenson, (1925), 41, T.L.R., 550.

when it is most indispensable, and although it were always willing it retains its narrow limitations. . . . Nothing would be more unbearable than if we had to depend upon favour for everything we need, it would be the lot of a beggar! Our personal freedom and independence depends not only upon our being able to pay, but also upon our being obliged to pay—our moral as well as our economic indepenence depends upon money." [1] A married woman's right to her own proprety and to her own earnings has been conceded, but the average married woman has no property, and if her life's work is to be in her home she has also no earnings. Her economic dependence to-day is on an entirely diffcrent level from man's, for though his conditions of work, even his power to find work, may depend on the will of another, he receives for that work definite wages over which he has complete control. A married woman's economic position, unless she has means of her own, or remains in the labour market, depends on "the moods, humours, antipathies" of another. Her husband may, no doubt he often does, give her an allowance over which she has complete control; there may be, no doubt often is, a marriage settlement. The allowance may be given with qualifications that it shall be spent in such and such a way. She may have the general right to pledge her husband's credit, but that only for necessaries and he may negative that right in innumerable ways. Her position is uncertain and ambiguous. Professor Hobhouse has well described the difference between "what a man earns", which is "his true and full property with unlimited right of disposal", and being a "dependant" to whom "money is given . . . for a purpose, and not . . . in absolute ownership" [2] but is not this distinction as important to a woman as to a man, and how is the demand of women for economic independence to be met?

[1] Von Jhering, *Law as a Means to an End*. Engl. Trans. Vol. i, p. 91.
[2] L. T. Hobhouse, *Elements of Social Justice*, c. vii, and see c. viii.

There is a school of thought [1] which would place men and women, here as everywhere else, on a basis of absolute equality—woman is to earn her own living in the same way as man earns his and as she is apparently expected to do in Russia to-day,[2] and all legislation giving her a special claim on him is to be swept off the Statute Book. How this principle would work out in practise it is difficult to foretell. The whole basis of the family might be altered if life became more communally organized than it is to-day, in which case no demands would be made by the individual household and woman would be as free as man. But if, as most people in this country believe, family life as we know it to-day is so rich in human values that its privacy and individuality should be retained, then, as has often been pointed out,[3] every worker outside the home requires a worker within the home. And in that case it would be quite consistent for the wife to be that worker in the home, if both parties desired to make a contract to that effect. Woman then would be responsible for her own maintenance in the same way as man is; she might earn her living inside the home by contract with her husband, he paying her as he would pay anyone else, or outside the home according to the arrangement made between them. Marriage would then cease to carry with it the right to maintenance. But might not such an arrangement easily work out to the disadvantage of woman and child? For where conditions are not equal, liberty of contract, as experience has proved, is often but an empty phrase, and the woman who contracted to remain in the home in the interests of the home and the child might find herself badly equipped to start work in the outside world when the contract came to an end and the other was unwilling to renew it.

1 Charlotte Perkins Gilman, *Woman and Economics*. Olive Schreiner, *Woman and Labour*.

2 *Woman in Soviet Russia*, Famina Halle.

3 See Mrs. Webb, "Report of Committee on Woman's Work."

Considerations of this kind have led to an entirely different solution of the problem of the economic position of married women; those who believe that a wife and mother will best satisfy her own needs and render the highest services to humanity through her work in the home find the solution in giving to her a legal right to a proportion of her husband's income.[1] In this way she would become responsible for her own maintenance and entitled to spend the money as she thought best, while he would no longer be called upon to defray any of her expenses.

Already in 1909 a preliminary draft of what was called "The Woman's Charter" was drawn up by Lady McLaren: "A wife," she says, "who devotes her whole time to housekeeping and the care of the children shall have a claim upon her husband during his life, and upon his estate after his death, calculated on a scale not exceeding the wages of a housekeeper in her station of life, provided she has not received any other personal allowance."[2] Behind this proposal lies the principle that marriage is a partnership and that salaries and wages are paid to a man not to dispose of as he wishes but to man and wife for the services which each performs. To many such a relationship between husband and wife seems utterly incongruous and repugnant, even as destructive of all that is valuable in family life. Some fear that it would put woman in too favourable a position, while others dislike the idea of law dictating to man what he should do and generally would do of his own free will.[3]

The first objection can be met with the assertion that means will assuredly be found by which a woman could forfeit her maintenance if her conduct should make such a course necessary. The development of the rights of women has

1 Annual Report, National Union of Societies for Equal Citizenship, 1923, now National Council for Equal Citizenship.

2 *Woman's Charter of Rights and Liberties.* Lady McLaren, 1909.

3 Letters. *Manchester Guardian*, March 6, 9, 20, 1923.

shown that in the family as everywhere else law can see that substantial justice is done.

To the second objection one may reply that it is the business of law to set a standard, to force upon the less just members of a society the standard of the more just. Law, in a democratically governed country at all events, is not a command imposed by an alien power, rather is it the expression of the social conscience of the day. But we must never forget its dual nature which makes it not merely the creature but also the creator of public opinion.

Is, then, the going out to work or the possession of private means to be a ground for forfeiture of maintenance?[1] The proposal of Lady McLaren seems to answer the question in the affirmative, but it is quite possible to give a different reply and yet put husbands and wives who both own property on a more equitable basis than they are on to-day. How women's organizations are seeking to solve the question of the rights and responsibilities of husband and wife is shown by a resolution of the National Union of Societies for Equal Citizenship: "That the N.U.S.E.C. in annual council assembled calls upon the Executive Committee to promote legislation to provide that a wife or husband shall have the right to a certain proportion of the income of the other."[2] This proposal would avoid the difficulty of deciding whether the separate means of a married woman were sufficiently large to relieve her husband of all responsibility, for it would be manifestly unfair to deprive her of her right to maintenance in virtue of the possession of an inadequate private allowance. At the same time, it would relieve the husband of a wealthy woman of the sole responsibility for the upkeep of the home which

[1] It appears that in Holland attempts are being made to amend the Civil Code, section 163, so that a husband would be bound to put at the disposal of his wife sufficient money for meeting household expenses in as far as her own income destined for that purpose is not sufficient and except in cases where he is no longer liable for said expenses incurred by his wife.

[2] Report of National Union of Societies for Equal Citizenship, 1923.

would become the joint concern of both. Each would be entitled to a definite proportion of the income of the other.[1] Matters of detail have not been thrashed out, but they do not appear to present any insuperable difficulties. Clearly, a husband would forfeit his rights if, being able, he refused to maintain his wife, while she would forfeit hers under certain conditions if, for example, she neglected her home or did not perform her part of the marriage relationship. And, no doubt, the day is not far distant when domestic disputes will be heard in courts specially established for the purpose of dealing with matrimonial questions, and having a procedure specially adapted to such matters.[2]

Possibly, too, the time may come when the question of the economic position of women may be solved in yet a different way. Some day society may be so organized that it will become possible for men and women to share domestic duties, either by each giving a portion of his or her time to paid work without and to unpaid work within the home, or by increasing the opportunities for remunerative work within the home.

(2) *Wife's Right to Husband's Consortium.* We have seen that in 1837 a woman had, in theory, the right to her husband's society and protection, but that in practice she had little power to enforce either. If he withdrew his society without lawful cause she might bring a suit for restitution of conjugal rights, and if she obtained an order he might be imprisoned for non-compliance with it. The object of the suit, it was assumed, was to obtain the return to cohabitation of the respondent, but as was pointed out in 1879 by Sir James Hannan, few suits were in fact "instituted for any

[1] Whether earned or unearned. As to a married woman's right to work see p. 255 *post*.

[2] " Courts of Domestic Relations " (Bill 10), 1928; L. J. Oct. 17th, 1931, " Courts of Domestic Relations "; *Marriage, Children and God*, by Claude Mullins, 1933, and Appendix.

other purpose than to enforce a money demand."[1] The Matrimonial Causes Act of 1884, as we have seen, abolished attachment for non-compliance with a decree for restitution of conjugal rights, and wife and husband were left with the remedy of a judical separation.[2]

May a woman bring an action against a person who has deprived her of her husband's *consortium*? The question was raised in 1861 when a certain Mrs. Knight claimed damages from a Mr. Lynch who, she alleged, had slandered her and caused her husband to leave her. The case went to the House of Lords but the question was not decided, the appeal being dismissed on other grounds. Lord Campbell and Lord Brougham were of opinion that an action would lie. "The loss of conjugal society . . . I think," said Lord Campbell, "may be a loss which the law may recognize to the wife as well as to the husband." Lord Wensleydale thought that such an action for loss of *consortium* would not lie . . . "She does not lose her maintenance which he is bound still to supply . . . He loses her services . . . in the conduct of the household and in the education of his children."[3] The question was apparently not raised again until 1923 in a case in which, for the first time, a woman brought an action against another woman for enticing away her husband. It was argued for the defence that the "wife had never acquired in her husband that right which the latter had in his wife . . . that it was only because a man had dominion over his wife that he could bring this kind of action, and that the wife had no corresponding right." This argument was not accepted by Lord (then Mr. Justice) Darling, who laid it down "that there was no distinction to be drawn here which would say that the husband could bring an action

[1] Marshall *v.* Marshall (1879) 5 P.D. 19.

[2] 47 & 48 Vic., c. 69, ss. 2, 5; and 15 & 16 Geo. V, c. 49, ss. 185–187. See also p. 48 *ante*.

[3] Lynch *v.* Knight, 9, H.L. Cas. 577.

because his wife was his property and that the wife could not because the husband was not her property", and he was of opinion "that the rights of the two parties were the same. The difficulties had been not that there was not the right, but that the remedy had not been devised. The law had devised that remedy by the Act which gave to a married woman the right to sue in her own name.[1] The second case of this kind was not brought until June of 1933 when Mr. Justice Swift again held that an action would lie. "The right," he said, "to sue for damaging the *consortium* of husband and wife was a mutual right of the husband and wife." In this, as in the earlier case, the wife did not succeed. "In order that the case should succeed," said Mr. Justice Swift, "I must be satisfied that his leaving the house was in consequence of some advice, some proposition, some enticement from Mrs. Hardy. It must be proved that his going was not of his own voluntary persuading but that he was enticed away. To my mind it has not been proved."[2] The law is the same for both men and women, but in practice it will be far more difficult for a woman to succeed in an action for enticement than for a man, simply because a man will be held to do of his own free will what a woman would not be held to do unless there were enticement or persuasion. Once again we are driven to the conclusion that the action for enticement ought to be abolished.

(3) *Wife's Right to Withdraw Her Consortium.* Step by step, by adding to the reasons which would justify her in refusing her society and services, and by making it possible for her to do so, the right of a married woman to withdraw her *con-*

[1] Gray *v.* Gee, (1923) 39 T.L.R. 429.

[2] Newton *v.* Hardy (1933), 49 T.L.R., 52, and *Manchester Guardian*, June 27, 1933. The action for loss of *consortium* due to injury to husband or wife has already been discussed. It does not appear that such an action has ever been brought by a wife. If it is retained there seems no reason why it should not be maintainable by a woman. See p. 50 *ante*.

sortium has been extended. The first Act to effect an improvement was the Custody of Infants Act of 1839, which though small in the actual redress which it gave, was as Harriet Martineau, writing ten years later, said the first Bill to strike a blow at the oppression of English legislation in relation to women.[1] The Bill was introduced as the result of an agitation carried on by Mrs. Norton, who, being separated from her husband, was deprived by him of the custody of, and even of access to, her children.[2] The Act gave power to the Court to grant to a mother access to her infant children, and even custody of those that might be under seven years of age, and thus affected her chiefly in her capacity as mother, under which heading we shall consider it.[3] But as the necessity for such access could arise where the marriage was unhappy it reacted on her rights and duties as a wife. It removed one of the chief reasons which had hitherto forced her to remain under the roof of a cruel or vicious husband. In the words of Lord Cottenham, who, in 1849, gave judgment in favour of the mother in a dispute as to whether she or her husband ought to have custody of their young children, "Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, that she should be at liberty to assert her rights as a wife without the risk of any injury being done to her feelings as a mother."[4]

This Act introduced a new principle which would logically call for wider application. And those who opposed the measure realized full well the significance of the change and insisted that the family relationship, as they knew it, could not continue to exist if rights of this kind were conceded to women. Sir Ernest Sugden, the most bitter opponent of the

[1] *History of Thirty Years Peace*: Harriet Martineau, Ch. xv.
[2] Chap. iii. p. 95.
[3] 2 & 3 Vic., c. 54; Chap iii.
[4] Warde *v.* Warde, 2 Ph., 786.

Bill at every stage, was throughout consistent in his attacks. A woman's rights, he contended, must be sacrificed; to concede her rights against her husband was to concede her right to act independently, and anything which facilitated independent action on her part threatened to break up the family. "A wise legislature," he said, "would seek to bind married people by a common interest, and certainly no wise legislature would hold out facilities for divorce. . . . This Bill, by providing the wife with the means of always commanding access to her children removed many of the obstacles which stood at present in the way of separation . . . let them beware how by altering the law they relaxed and weakened that bond by which domestic morality was cherished and preserved." [1]

The Act of 1839 paved the way for further changes in more ways than one. It drew attention to the many disabilities under which married women were labouring and thus began the education of public opinion.[2] But it was not until the middle of the century that the impact of a new force was felt. By that time women themselves were awakening to a different conception of their own value and their own needs, above all to a realization of the injustice of the law as it affected them. And when the Divorce Bill was before the country the women's point of view was not without supporters.

We have already referred to the Divorce Act of 1857 in so far as it affected man. The Bill, as first introduced in 1854, proposed to give to him the right to divorce his wife if he could prove one act of adultery; it proposed to grant divorce to a woman only if she could prove that her husband had been guilty of incest. Anything short of that she must forgive; at all events the law would not consider adultery alone a sufficient reason for her to withdraw her *consortium*. Every point

[1] Parliamentary Debates, Feb. 14, 1838; Vol. 40, p. 1115.

[2] *Ibid*, July 30, 1838; Vol 44, p. 779.

in this Bill was debated at great length and aroused much feeling and interest. Some, on religious grounds, deprecated all divorce, others sought to justify the limited divorce by Act of Parliament, others were wholeheartedly in favour of making it open to all on equal terms. Some again wished to make it impossible for the divorced man and woman to marry, others wished to make it illegal for a divorced woman to marry again. Neither of these two latter suggestions was adopted.[1] Outside the House the little band of women laboured for equality. And although the woman's rights movement was not strong enough to enforce complete equality their protest was not without some effect. In 1855 Mrs. Norton published her "Letter to the Queen on Lord Cranworth's Divorce Bill." It did not succeed in making a husband's adultery a ground on which a wife might petition for divorce, yet her criticism of Lord Cranworth's remark that such legislation would enable a man to gain his freedom "by merely being a little profligate", drew attention to the woman's point of view and caused the Chancellor to comment on "the able pamphlet" which blamed him for the expression, and to explain his meaning.[2] Writing in 1855 Lord Brougham said of Mrs. Norton, "I feel certain that the law of divorce will be much amended, and she has greatly contributed to it."[3]

Inside the House Lord Lyndhurst fought hard on behalf of women, and the concessions which were finally made were in large measure due to his efforts. Adultery by itself was not to be sufficient cause for a woman to divorce her husband, since the Committee to whom the Bill was referred equally with the two Houses of Parliament were, with few exceptions, quite convinced that adultery should generally be condoned

[1] Parliamentary Debates, June 13, 1854, Vol 134, p. 943 *seq.*
[2] *Ibid*, p. 7, and May 20th, 1856. Vol. 142, p. 402.
1856.
[3] J. G. Perkins, *Life of Mrs. Norton*, p. 248.

by a wife but never by a husband. The Act, in its final form, asserted a woman's right to divorce her husband if he were guilty of rape or unnatural offences and also if his adultery were coupled with incest, or with bigamy, or with cruelty or with desertion. It made desertion, like cruelty and adultery, a ground for a divorce *a mensa et thoro*, or, as we now say, for a judicial separation. And the amendments which were added at the instigation of those who were working for different conditions for women, formed a little charter of women's rights against a worthless husband.[1]

Thus we see that by 1857, in spite of the inequality introduced by the Act of 1857, it had become easier for a woman to enforce her husband's *consortium*, since she had now some redress if he failed in his duty. The Married Women's Property Act of 1870,[2] which secured to married women the right to certain kinds of their own property, again extended their rights, but it was not until 1878 that something was done to assist women who had no means of their own. In that year Frances Cobbe, writing in the *Contemporary Review*, drew attention to the terrible hardship of women who were forced to live with drunken and vicious husbands, and proposed legislation which should afford "to these poor women by means easily within their reach the same redress which women of the richer class obtain through the divorce court."[3] The Matrimonial Causes Act of 1878 gave to justices the power to grant an order of non-cohabitation and maintenance to a woman whose husband had been convicted of an aggravated assault upon her.[4] Such an order was to carry with it the same rights as a decree of judicial separation, and also custody of the children up to the age of ten. In 1886 an

1 20 & 21 Vic., c. 85, ss. 21, 25.

2 33 & 34 Vic., c. 93.

3 *Wife Torture in England*, by F. P. Cobbe. *Contemporary Review*, April, 1878.

4 41 & 42 Vic., c. 19, s. 4.

attempt was made to give yet further redress to a woman whose husband withheld from her the protection and support which it was his duty to provide, by making it possible to her to refuse her *consortium* where her husband had been guilty of desertion. But the feeling of the House was against such legislation, and the Act of 1886, though it conceded the substantial right of giving to a woman the power to enforce maintenance at the hands of a husband who had deserted her, did not allow her to refuse her *consortium* should he desire to resume cohabitation.[1] In 1895,[2] however, this right also was conceded by the Act of that year, which repealed and consolidated the Acts of 1878 and 1868, and gave to Justices the power to grant separation orders, in addition to maintenance, and with custody of children up to the age of sixteen, not only to a wife whose husband was guilty of an aggravated assault upon her or had deserted her, but to a wife who herself put an end to cohabitation on account of his persistent cruelty or neglect to maintain her or her infant children. This was a substantial advance on the Act of 1878. For although it has been held that a non-cohabitation clause should not be inserted in a maintenance order unless the wife's safety requires it,[2] the right to it exists should the husband's behaviour make it desirable. Cruelty, neglect to maintain, misconduct, were now sufficient infringements of her rights—always of course provided that the Court was of opinion that these conditions existed—to justify her taking action and withdrawing her society and her services, and in 1902 the Licensing Act of that year made drunkenness a ground for a separation order.[3] The Summary Jurisdiction (Separation and Maintenance) Act 1925[4] extended the grounds on which a wife might apply for an order of non-cohabitation to include cruelty on her husband's part to her

1 49 & 50 Vic., c. 52. 2 Snow *v.* Snow (1932) 96, J.P. R.477.
3 58 & 59 Vic., c. 39. See p. 69 *ante*.
4 2 Ed. 7, c. 28, s. 5. 5 15 & 16 Geo. V, c. 51.

children, his insistence on intercourse whilst he was knowingly suffering from venereal disease, and his compelling her to submit herself to prostitution.

In 1923 the right which was withheld in 1857 was granted, and adultery on the part of her husband became a ground on which a woman might petition for a divorce,[1] in spite of the fact that there was still much opposition. Finally, the Supreme Court of Judicature (Consolidation) Act,[2] to which we have already referred, gave to women the same rights as it gave to men, with the added right to a decree of divorce against a husband guilty of rape or of unnatural offences.[3] But a wife may even now not claim damages against a woman with whom her husband has committed adultery although such woman may be added as respondent in a divorce petition. It is difficult to adduce any reason why this distinction should still exist, and the right should either be conceded to a woman or denied to a man.

In 1920, as the result of the Report of the Royal Commission which sat in 1918, a Bill was introduced which proposed certain far-sweeping changes in the divorce laws of this country. The promoters of the Bill wished to grant divorce, not only on the ground of adultery but also where the defendant "has deserted the applicant for a period of at least three years; or has since marriage treated the applicant with cruelty; or is incurably insane and has been continuously a certified lunatic for a period of at least five years immediately preceding the application; or is an incurable habitual drunkard, and has for a period of at least three years been separated from the applicant; or is undergoing sentence of imprisonment under a commuted death sentence." This Bill and Bills of a similar nature[4] since introduced, were

[1] 13 & 14 Geo. V, c. 19, and Parliamentary Debates, March 2, 1923, Vol. 60, p. 2355.
[2] 15 & 16 Geo. V, c. 49.
[3] See p. 54 *ante*.
[4] The most recent Bill was introduced in November, 1933.

hotly debated in the House and met and still meet with much opposition from those who deprecate the idea of making divorce any easier. Into the general arguments we do not propose to enter, but if and when changes of this nature are made they will assuredly apply equally to men and women.

(4) *Wife's Nationality and Domicil.* We saw in Chapter I that, in 1837, a woman neither lost nor acquired British nationality merely through marriage.[1] The first change was made by the Naturalization Act of 1844,[2] which enacted that a foreign woman marrying a British subject should, by the act of marriage, herself become naturalized, but it was not until 1870[3] that a British woman was deprived of her nationality by marriage with a foreigner. The change was made, it appears, to bring the law of England more into conformity with the law abroad, and the clause passed the House after a very short debate. Only two voices were raised against depriving women of their nationality. One member expressed surprise "that at a time when the rights of women were so loudly advocated the House should seem determined thus to curtail them."[4] For some time after 1870 the question of nationality and naturalization did not arouse any interest, but a few years before the War the whole matter came up for discussion at conferences convened by the different countries of the Empire. By that time the movement for the emancipation of women had invested the question with a new importance, yet when the Bill to change the law was introduced into Parliament in 1914 it re-enacted the old provisions which compelled a woman to adopt the nationality of her husband. These provisions were strenuously opposed, and the opposition, though it

[1] Ch. 1, p. 15 *ante*.
[2] 7 & 8 Vic., c. 66, s. 16.
[3] 33 & 34 Vic., c. 114.
[4] Parliamentary Debates, April 25, 1870, Vol. 200, p. 1740.

did not succeed in its object, did succeed in adding a proviso of considerable importance which, in fact, introduced the principle of the double nationality of husband and wife. Clause 10, after enacting that the wife of a British subject shall be British and the wife of an alien shall be an alien, adds the following words: "Where a man ceases during marriage to be a British subject it is lawful for his wife to declare that she desires to retain British nationality and thereafter is deemed to remain a British subject.[1] The whole question suddenly became of vital importance to hundreds of women at the outbreak of war, and the injustice of depriving a British woman of her nationality through no fault of her own was so apparent that the Acts which were placed on the Statute Book in 1918 and 1919 made special provisions for her. The Act of 1918 enacted that the revocation of a man's naturalization order should not affect his wife except by special order of the Home Secretary, and the Act of 1919 provided that restrictions imposed on former enemy aliens should not "apply to any woman who was at the time of her birth a British subject."[2] In 1922 a Bill which proposed to restore to British women the right which they had lost in 1870[3] was referred to a Select Committee, which in 1923 reported that it had been unable to come to a decision.[4] Since that date the question has been discussed a number of times both in Parliament and outside Parliament, both in this country and at various international conferences. In 1926 the Nationality Committee of the Imperial Conference examined it but came to no decision. It was discussed at the Hague Conference for the Codification of International Law in 1930, when a Convention was drawn up.[4] This Convention was strongly

[1] 4 & 5 Geo. V, c. 17, s. 10.
[2] 8 & 9 Geo. V, c. 38, s. 7A.
[3] Report by the Select Committee on the "Nationality of Married Women," 1923
[4] Cmd. 4347. Miscellaneous No. 4 (1933).

criticized by various women's organizations, and as a result the question was again discussed at the 1931 and 1932 meetings of the Assembly of the League of Nations. The Assembly of 1932 gave its support to the Hague Convention, and on 15th June, 1933, Lord Sankey introduced a Bill into the House of Lords to give effect to it. This Bill was the object of strong criticism, and a second Bill was introduced into the House of Commons on June 27th, 1933, by Sir John Sandeman Allen. The latter Bill would enable a British woman marrying an alien to retain her British nationality should she desire to do so. The former Bill, which became law in 1933,[1] makes but slight alterations in the law as it exists, and is criticized on the ground that it gives a new lease of life to the principle that a woman should lose her nationality on marriage. It provides that "the wife of a British subject shall be deemed to be an alien," with certain exceptions.[2] Thus, where a British woman marries an alien she shall not cease to be British unless she acquires on marriage the nationality of her husband,[3] and if during marriage a man loses his British nationality she shall not cease to be a British subject unless she acquires his new nationality, and even though she acquires his nationality she may retain her British nationality if she desires to do so. But, except in special circumstances, her application to do so must be made within twelve months from the date on which she acquired her new nationality. The Act of 1914 imposed no such time-limit, and in this respect a new restriction has been introduced. Finally, a British-born woman married to an alien who is a subject of a state with which Great Britain is at war may resume her British nationality if the Secretary of State grants her a certificate of naturalization. On the other hand the

1 British Nationality and Status of Aliens Act (1933), 23 & 24 Geo. V, c. 49.

2 *Ibid.*

3 *Ibid.*

granting of a certificate of naturalization granted to an alien will not make his wife a British subject unless she declares that she desires to become a British subject.

Closely connected with the question of nationality is that of domicil. As we have seen, a married woman could not during coverture acquire an independent domicil of her own, "either because of her obligation to live with her husband or as a consequence of the union between husband and wife brought about by the marriage tie." [1] And she cannot to-day acquire a domicil of her own so long as the marriage tie exists. Whether or no a woman who had obtained a judicial separation or whose husband had deserted her could acquire her own domicil apart from his has only recently been decided in the negative. In 1859 [2] Lord Cranworth suggested that a woman who was separated from her husband, he having acquired a domicil abroad, might acquire her domicil here, and in 1876 [3] Lord Philmore made a similar suggestion. This was doubted by Lord Cave in a case heard in 1921,[4] and in 1926 [5] the question was finally settled. The last mentioned case was an appeal to the Privy Council from the Superior Court of Alberta, Appellate Division. A married woman married in Ontario, where her husband had his domicil, left him and settled in Alberta. The husband had not been heard of for years and she sought to obtain a decree of divorce upon grounds which would have been sufficient if she were domiciled in Alberta. "The questions," said Lord Merrivale, "are of general importance, namely, whether a woman judicially separated from her husband may acquire a domicil of choice apart from the husband, and whether in the Courts of such domicil she may obtain a decree of divorce upon

[1] Lord Advocate *v.* Jaffery (1921) A.C. 146.
[2] Dolphin *v.* Robin (1859) 7 H.L. Cas. 390.
[3] Le Suer *v.* Le Suer (1876) 1 P.D. 139.
[4] Lord Advocate *v.* Jaffery, *supra*.
[5] A.G. for Alberta *v.* Cook. (1926) A. C. 444 P.C.

grounds sufficient under the law there in force, although the husband is not there domiciled." The decision was that a decree for judicial separation does not enable the woman to acquire a domicil different from that of the husband, and she was therefore not entitled to sue for a divorce in a Court other than that of her husband's domicil.[1]

It will be seen from the above that the Supreme Court of Judicature (Consolidation) Act of 1925[2] did not make any alterations with regard to domicil, but it is interesting to note that the Matrimonial Causes Bill of 1924 contained the following section: "The jurisdiction of the High Court in proceedings for divorce under this Act shall be limited to cases in which the parties to the marriage are domiciled in England and Wales: Provided that, where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and was immediately before the desertion or deportation domiciled in England or Wales, her domicil shall, for the purposes of this Act, be treated as the same as it was immediately before the desertion or deportation."[3] Marriage confers the husband's name on his wife which, apparently, she may retain until she acquires another by reputation, and even after divorce.[4]

[1] Our Courts have no jurisdiction in divorce proceedings unless the parties are domiciled in this country. Domicil is also important in deciding the persons to whom and the conditions under which the movable property of a deceased person is to be distributed. Thus, where an Englishwoman was domiciled in France, she could not, by her will, deprive her daughters of their share of her personal property in England to which they were entitled by French Law. A decree annulling marriage on the ground of impotence can be pronounced only by the Court of domicil of the parties. Inverclyde *v.* Inverclyde (1931), P. 29.

[2] 15 & 16 Geo. V, c. 49.

[3] Matrimonial Causes Bill (1924), s. 2.

[4] Cowley *v.* Cowley (1901), A.C. 450. She may continue to use her own name.

CHAPTER III

WOMAN AS MOTHER, 1837–1933

LEGITIMATE CHILDREN

(1) *Parents' Rights to Custody and to Services of Children.* The Common Law of England vested in the parent an absolute right both to the custody and to the services of all children during minority.[1] Infringement of the right to custody did not, and does not to-day, entitle the parent to bring an action for damages against a person who deprives him of his child, and the parent's remedy under such circumstances is to apply either for a writ of *habeas corpus*, or to the Chancery Division of the High Court to have the child returned.[2] Where, however, a parent is deprived not only of custody but also of the services of his child an action for damages still lies. Thus, a parent may sue the man who seduced his daughter provided the girl was living at home and rendering some service, however nominal, in the home at the time the seduction took place.[3]

The Court of Chancery, however, has from time immemorial[4] regarded itself as the guardian of children, and in that capacity might deprive a parent of guardianship if he showed himself unworthy to exercise it, and the welfare of the child required it. This power is now vested in the Chancery Division of the High Court of Justice.[5]

But it was not until 1891[6] that Parliament interfered. In

[1] Ch. 1, p. 15 *ante*.
[2] Hall *v.* Hollander (1825), 4 B. & C. 660.
[3] Peters *v.* Jones (1914),, 2 K.B. 781.
[4] Simpson, *Law and Practice Relating to Infants*. 4th Ed. p. 106.
[5] Judicature Act (1873), 36 & 37 Vic., c. 66, s. 25; Reg. *v.* Gyngall (1893), 2 Q.B. 236.
[6] 53 & 54 Vic., c. 3. " An Act to amend the Law relating to the Custody of Children."

that year an act to amend the law relating to the Custody of Children was passed which enacted that where a parent applied to the High Court for the production of his child the Court might refuse to deliver the child to its parent if such parent had abandoned or deserted it, or allowed the child to be brought up at another person's expense. Further rights of interference were given by the Poor Law Act of 1899 which enacted that where a child was maintained by the guardians of a poor law union, the parents having proved themselves unworthy through desertion or neglect, such guardians might at any time resolve that until the child reached the age of eighteen all the rights and powers of the parent should rest in the guardians.[1] In 1925 a Guardianship of Infants Act[2] was put on the Statute Book which, as we shall see later, altered considerably the respective rights of father and mother but did not, apparently, affect the right of the parent as against strangers. Thus it was laid down in 1931 by Scrutton, *L.J.* and Slesser, *L.J.* in a majority decision (Greer, *L.J.* dissenting), that there had been no change of attitude on the part of the Legislature since 1891, except as regards the respective claims of father and mother, and that the Court cannot disregard the wishes of the only parent unless that parent has neglected his or her duty in a matter of essential importance. In the case in question a mother claimed the custody of her infant child in order to place it in an institution of her own faith instead of allowing it to be adopted by people of a different religion. The mother had, in the first place, voluntarily parted with the child and had later changed her mind. "I cannot," said Scrutton, *L.J.*, "regard the difference between home training and training in a respectable institution against which nothing can be said except that it is an institution, as sufficiently important to enable the

[1] 62 & 63 Vic., c. 37, s. 1.
[2] 15 & 16 Geo. V, c. 45.

Court to disregard the parent's wishes as to religion in the case of a child so young as to have no wishes of its own."[1]

As between mother and father the rights to custody and to the services of their infant children were, in 1837, vested in the father. Apparently, the right to a daughter's services is still in the father and not in the mother, and where father and mother are alive at the time when their daughter is seduced the mother has no right of action.[2]

The first Act to modify the father's right to custody was the Custody of Infants Act, to which we have referred in another connexion, which was put on the Statute Book in 1839.[3] Caroline Norton, who focused the attention of the British public and the British Legislature on the injustice of the existing law, was a grand-daughter of Richard Brinsley Sheridan. She and her husband having quarrelled, he removed their three children from her care, as he had by law the right to do, denying her even access to them. Her case was not an isolated one,[4] but she had two weapons which were denied to her sisters in misfortune. She had influential friends, and she was able to make known her sufferings by means of her writings. In 1837 when the Custody of the Infants Bill was before the House she published a pamphlet entitled "The Natural Claims of a Mother to the Custody of her Children as affected by the Common-Law Rights of the Father", and sent a copy of it to every Member of Parliament in the hope of influencing his vote. "I also intend," she wrote, "if possible (and what is there not possible in this world?) to have a discussion of the alteration of that law in Parliament this session . . . I insisted on the rule already existent for illegitimate children, that children under the age of seven, at

1 In *re* Carroll L.R. (1931) 1 K.B. 317.

2 Peters *v.* Jones (1914), 2 K.B. 781; and Thompson *v.* Fitzpatrick (1920), 54 I.L.T., 184.

3 2 & 3 Vic., c. 54; and Ch. 1, p. 82 *ante*.

4 Rex *v.* Greenhill, A. & E., p. 624.

all events, should belong to the mother; and after that access dependent, not on the father, but on the Court of Chancery."[1] Strangely enough, she had no desire to alter the general status of married women, though she realized how one inequality resulted from another, and recognized in the lack of property one of the chief causes of women's disabilities. "The fact is, in this commercial country . . . the rights of property are the only rights efficiently protected . . . the great obstacle, in all the cases I have looked through, to the woman obtaining the child or even obtaining that it should be in the hands of a third party as a proper guardian, has been the want of property to justify the interference of the law."[2]

The Custody of Infants Bill was introduced into the House of Commons in 1837 by Serjeant Talfourd but did not become law until 1839. We have already referred to the arguments of those who opposed it,[3] arguments which did not deny the terrible hardship which a husband could inflict on his wife by separating her from her children, but justified it on the ground that by the threat of such separation, obedience and, therefore, family unity would be best secured. The Act, as finally passed, did not concede to a woman all that was claimed for her by Mrs. Norton. The mother did not, by right, become guardian of her children under seven, and the Common-Law rights of the father were left intact. The Act merely gave to a woman the right to apply to the Court of Chancery, and to the Judges of that Court the power, in their discretion, to grant her access to her infant children or, if such children were under seven years of age, custody of them. The rights which it conferred were of the slightest; equality between mother and father was denied, yet the Act struck the first blow at the hitherto absolute rights

[1] *Life of Mrs. Norton* by J. G. Perkins, p. 133.
[2] *Ibid.*, p. 134.
[3] Page 83, *ante*.

of the man as against the woman, and thus paved the way for further concessions.

The supporters of the emancipation of women naturally sought to increase the rights of a woman over her child, but by 1873 the movement was not sufficiently strong to effect any improvement. Yet an Act passed in that year conceded another right in that it raised the age up to which the Court might grant custody to sixteen, and declared that an agreement between husband and wife for separation should not be rendered void by the fact that he had handed over custody of the children to her.[1] But a woman under such a contract was not in the same position with regard to her children as her husband would have been in had the deed not been executed. The father's rights were absolute and could be forfeited only if it were positively harmful for the child to remain in his care, whereas the rights of the mother were dependent on the Court. "A deed," said the Lord Justice James in 1879, "places the ward in the same position as a fatherless child . . . it is the duty of the Court to see that the child is brought up in the religion of the father. In the absence of the father (the father being assumed to be practically absent) the Court is the real guardian of the infant, and must perform its duty to the ward accordingly, and if necessary wholly irrespective of the convictions of the mother and by separating the child from her."[2]

Gradually the rights of women in respect of their children have been extended. In 1878 the Matrimonial Causes Act made it possible for a woman whose husband had been convicted of an aggravated assault upon her to obtain a separation order, and enacted that under such circumstances she might have the custody "of any children of the marriage under the age of ten years."[3] Yet the Custody of Infants Act of 1873

[1] 36 & 37 Vic., c. 12, s. 2. "An Act to amend the Law as to the Custody of Infants."

[2] *In re* Besant, 11 Ch. D. p. 508

[3] 41 & 42 Vic., c. 19.

had already recognized the justice of her claim to custody up to the age of sixteen,[1] and nothing but a deep distrust of the principle thus conceded can account for the age limit in the Act of 1878. The clause was repealed when the Act of 1895 consolidated the earlier Acts, and sixteen was substituted for ten.[2]

By 1884 the whole position had changed. The Married Women's Property Acts had at last secured to women the possession of their own property, and with that alteration of the law went a general alteration in their status. Women were demanding equal rights with their husbands to the custody and control of their children. Outside Parliament there was great activity; lectures were delivered, petitions drawn up, members bombarded, funds appealed for. "Mr. Bryce has obtained Wednesday, March 26th," wrote Mrs. Elmy, in 1884, "for the second reading of the Custody of Infants Bill. We urge all our friends, therefore, to prepare petitions *at once* to both Houses of Parliament, and also to write to the members of their own constituencies on the subject."[3] And in 1886, after the first Bill had been lost and the second was before the House of Lords, she wrote, "The Bill, though it will not establish the rights of parents will do much to remedy the injustice of the present law . . . there is nothing to prevent the passing of the measure into law . . . provided our friends continue heartily to petition and above all to write to every peer. . . ."[4] Those who had drawn up the original Bill, those who supported it inside as well as those who worked for it outside Parliament, sought to bring about equality between mother and father: parents during the marriage were to be joint guardians; on the death of either the survivor was to be guardian; where, the parents being separated,

1 Parliamentary Debates, Vol. 214, p. 884.
2 58 & 59 Vic., c. 39, s. 5. "Summary Jurisdiction (Married Women) Act."
3 *Englishwoman's Review*, 1884, p. 91.
4 *Englishwoman's Review*, 1886, p. 221.

questions of custody or religious education arose, the Court was to make an order as it thought fit. Parliament refused to sanction such far-reaching changes. Its attitude finds expression in the words of Earl Beauchamp: "Nothing could be more injurious than divided guardianship. . . . The Bill would introduce discord between husband and wife, it would place women in a position of equality with men, which they did not by nature possess."[1] The Act of 1886 finally conceded to a mother the right on the death of the father to become guardian of her infant children either alone or jointly with a guardian appointed by him, the right to appoint by deed or will a guardian to act after her own and her husband's death, and the right, which however was only provisional, to nominate a guardian to act with her husband on her death. This appointment the Court might confirm at its discretion. The Act further gave to the Court, on the application of the mother, the power to make any order with respect to custody and access which it might think fit having regard to the welfare of the infant, the conduct of the parents and to the wishes of both mother and father.[2]

Thus those who had hoped for the complete reversal of the old Common-Law doctrine and a recognition of the complete equality of mother and father were disappointed. The right to custody and control was left, by this Act, in the father; in him was vested the absolute right to decide the religion, the education and the general upbringing of the child. Even a widowed mother had not, after the passing of this Act any more than before it, the right to have her children brought up in a religion different from her dead husband's, unless some very special reason would induce the court to grant her such a privilege; nor would an agreement made between a husband and wife before marriage that a child

[1] Parliamentary Debates, House of Lords, Ap. 21 (1885), Vol. 297, p. 298.
[2] 49 & 50 Vic., c. 27. "Guardianship of Infants Act."

should be brought up in a religion different from his be legally binding.[1]

But a great concession had been made to woman in admitting that the Court could take her wishes into consideration as well as his, a thing which it could not do before the Act of 1886. "Nobody," said Lindley, *L.J.*, giving judgment in an appeal by the father against the decision of Mr. Justice Chitty, that a child should live six months of the year with him and the other six with the mother, "can read the various sections of the Act without seeing that it is essentially a mother's act. It has very greatly extended the rights of mothers . . . to say that Section 5 is to have no operation unless the father has so conducted himself towards his children as to justify the Court in depriving him of his children is to reduce the section to a nullity."[2] The Guardianship of Infants Act of 1886 certainly marked another milestone in the long road towards equality, but it was a half measure and pointed forward to a further Act which should give completely what it had given in part.

For many years after 1886 the question of equal guardianship did not engage the active attention of those who were working for the emancipation of women. The chief struggle centred round the franchise, the granting of which, it was felt, would make all reforms more attainable. When enfranchisement was won, women again turned their attention to other matters. In 1922, in 1923, and in 1924, Bills were introduced into Parliament which provided that men and women should have the same rights in respect of their children.

In 1922, after the Bill had been debated, the whole question was referred to a Joint Committee of both Houses of Parliament. Once again the proposals aroused a great deal of opposition, once again the old objections with which we

[1] *Re* Nevin. An infant. (1891). 2 Ch. 299.

[2] *In re* A. & B. (1897) 1 Ch. 786.

have become familiar made their appearance. In the words of Sir Chartres Biron in evidence before the Committee: "We are suddenly asked by this Bill . . . to change the whole status of family life in this country. I regard that change as not merely unnecessary but as mischievous, because I think it would sacrifice entirely the peace of the home and the interests of the children."[1] Were not these very sentiments expressed by Sir Ernest Sugden when, nearly ninety years before, he used all his eloquence to prevent the first Custody of Infants Bill from becoming law?[2] And again we are reminded how one disability is made the ground for the continuation of others, again we are forced to the recognition that there can be no equality anywhere unless there be equality everywhere. ". . . The English Law, both Common Law and Equity, says if two people live together, as you cannot run the home by a committee of two, one of them must have the deciding voice, and I think with wisdom it gives the husband a deciding voice. He has more experience of the world. In nine cases out of ten he makes the money which keeps the home going, and as he pays he certainly ought to have a commanding voice in the decisions which are come to."[3] To which Mrs. Wintringham replied: "But I think there is something to be said for the services the woman gives in the house. . . . Surely that counts almost equally with the money the man pays."[4]

In 1925 the Guardianship of Infants Act, which amended the Act of 1886, established equality in law between the sexes with respect to the guardianship of infants and the rights and responsibilities conferred thereby.[5] In the case of dispute between mother and father the Court is to decide, and "shall regard the welfare of the infant as the first and

1 Minutes of Evidence, Committee on Guardianship, etc. of Infants Bill, p. 2.
2 Page 82.
3 Evidence of Sir C. Biron, *supra*, p. 3.
4 Evidence of Mrs. Wintringham, *supra*, p. 9.
5 15 & 16 Geo. V, c. 45.

paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."[1]

"The welfare referred to there must be taken in its large significance as meaning that the welfare of the child as a whole must be considered," said Lord Hanworth, *M.R.* "... It is not merely a question whether the child would be happier in one place than in another, but of her general well-being."[2] "The matters of immediate consideration," said Lord Merrivale, "are the comfort, the health, and the moral and intellectual and spiritual welfare of the child."[3] But the welfare of the child, though the paramount, is not the only consideration and among other conditions "the wishes of an unimpeachable parent undoubtedly stand first."[4] Each parent may by deed or will appoint any person to be guardian of the infant after his or her death. The surviving parent or the guardian may apply to the Court and it is for the Court to decide whether one or other shall act solely or whether they shall act jointly. And in the event of a dispute between joint guardians on any matter affecting the welfare of the child the Court's direction may be sought and an order made by the Court.[5]

And so, eighty-six years after the first Custody of Infants Act asked that a mother might have some rights over her infant children in cases where she was separated from her husband through no fault of her own, the last Custody of Infants Act to deal with the respective rights of father and

1 15 & 16 Geo. V, c. 45, s. 1.

2 *In re* Thain, Thain *v.* Taylor (1926), 1 Ch. 676.

3 W. *v.* W. (1926), p. 111.

4 *In re* Thain, *supra.*

5 15 & 16 Geo. V, c. 45, ss. 5, 6.

mother was placed on the Statute Book, sweeping away the remaining vestiges of inequality.

The Act of 1925, in one respect, placed the father at a disadvantage. The Act of 1886[1] had given the Court power, in the application of the mother, to make any order with respect to custody and access which it might think fit. In 1886 it was not necessary to make a similar provision in respect of the father. The Act of 1925[2] empowered the Court to make such an order though the mother was residing with the father when she made her application, though it is unenforceable while she remains with him and ceases to have effect if she continues to reside with him for three months after it is made. But the Act made no mention of the father's right to apply, and it was not until 1928 that the omission was rectified. The Administration of Justice Act[3] of that year empowers the Court to make an order in respect to custody and access "upon the application of the father of an infant in like manner as these powers may be exercised upon the application of the mother of the infant."

The consent of both parents or, if the parents are living apart, of the parent who is entitled to custody, is required to the marriage of an infant, but the Court may dispense with such consent if it is unreasonably withheld.[4]

(2) *Parent's Duty to Maintain Children.* The duty of a parent to maintain his children was, as we have seen, of the slightest in 1837.[5] And even to-day there is no actual legal obligation on either father or mother. There is no Common Law duty imposed on the father to pay the debts, even the debts for necessaries, incurred by his child unless they be incurred with his consent. But both Common Law[6] and Equity

[1] Page 99 *ante*. [2] 15 & 16 Geo. V, c. 45, s. 3.
[3] 18 & 19 Geo. V, c. 26, s. 16.
[4] Guardianship of Infants Act, 1925, s. 9. No valid marriage can be contracted if either party is under 16 years of age. 19 & 20 Geo. V, c. 36.
[5] Ch. I, p. 18 *ante*.
[6] Martimore *v.* Wright (1840), 6 M. & W., 482.

recognize the moral obligation of a father to provide for his children, and the Court of Chancery, in dealing with disputes over property, proceed on the assumption that the father is under such an obligation. "Where," said Jessel, *M.R.*, "one person stands in such a relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of the other, or in the joint names of the person and the other, of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other; and, therefore, in the absence of evidence to the contrary, that purchase or investment is held to be itself evidence of a gift." Thus, where a father makes a purchase or investment in the name of his child that is itself evidence of a gift because the father is under the obligation to provide for his child "from the mere fact of his being the father." But the mother, it appears, is under no such obligation. . . . "There is," said Jessel, *M.R.*, "no moral legal obligation . . . I do not know how to express it more shortly—no obligation according to the rules of equity on a mother to provide for her child . . . There is no such obligation as a Court of Equity can recognize as such." There is, therefore, where the mother's property is involved, no *presumption* that a gift was intended unless evidence to prove such gift be forthcoming, and the ordinary rule of equity that "the trust . . . results to the man who advances the purchase money" holds good.

Legislation has not yet given to a child the direct right to enforce maintenance, but indirectly it has gone a considerable way towards achieving that object. The Poor Law Authorities had already in 1837 for years been able to get maintenance orders against a father, and after his death against a mother, if their child became chargeable. In 1882, by the Married

[1] Bennett *v.* Bennett (1879), X Ch. D. 477.

Women's Property Act,[1] liability was imposed on a married woman possessed of separate property "provided that nothing in this Act shall relieve her husband from any liability imposed on him by law to maintain her children and grandchildren." This provision and the provisions of the earlier Act relating to liability were re-enacted by the Poor Law of 1930.[2] Again, various Acts, beginning with the Education (Provision of Meals) Act 1906[3] and ending with the Education Act 1921,[4] impose upon parents the duty to pay so much as the Local Education Authority may require towards the expenses incurred in providing meals for school children, or for providing special accommodation for children suffering under a disability, and such amount may be recovered as a civil debt.

The criminal liability of parents, and indeed of anyone who has the custody, charge, or care of a child, for neglect has been greatly extended. The Poor Law Amendment Act of 1868 provided for the punishment of a parent who neglected a child so as to cause it harm,[5] the Children's Act of 1908[6] and the Children and Young Persons Act of 1933[7] carried the protective and punitive provisions yet further, and the Education Acts dating from the first Act of 1870 to the present-day Act of 1921[8] have made parents responsible for the attendance of their children at the places of instruction required by law. With regard to the respective obligations of father and mother, the father cannot, it appears, delegate his duties and relieve himself of the responsibility which custody entails. Thus where a man entered into an agreement with his wife to pay her a weekly sum, she to have custody of the children, it was held that if the children were so neglected as to endanger their health he might be prosecuted and this even though

[1] 45 & 46 Vic., c. 75, s. 21.
[2] 20 & 21 Geo. V, c. 17, ss. 14, 18, 19, 20.
[3] 6 Ed. 7, c. 57.
[4] 11 & 12 Geo. V, c. 51, ss. 83.
[5] 31 & 32 Vic., c. 122, s. 37.
[6] 8 Ed. 7, c. 67, s. 12.
[7] 23 Geo. V, c. 12.
[8] 11 & 12 Geo. V, c. 51, ss. 42–45, 78.

he had fulfilled his part of the agreement,[1] and in spite of the fact that the mother was also liable. A parent cannot cease to have the custody of the children.

A woman's rights to enforce maintenance of her children under the various Married Women's Maintenance Acts and under the Matrimonial Causes Act have already been referred to.[2]

Of recent years it has been suggested that maintenance should become a duty enforceable by a civil action against both father and mother. A provision of this nature was not inserted in the Guardianship of Infants Act 1925, but the two Bills introduced in 1923 and 1924 did seek to have the principle admitted. In the words of the Bill introduced in January 1924 "The father and mother of every legitimate infant (if such infant be unmarried) shall be liable for the cost of maintenance and education of such infant in proportion to the means of the father and mother respectively, and such liability shall be capable of being enforced under this Act by the father, mother, or guardian, of any such infant against the father and mother of any such infant.[3] If a clause of such a character ever became law we should, for the first time, have admitted the principle which is admitted in certain countries abroad,[4] that a parent has a civil obligation to support his child. The suggested provision, it will be seen, places responsibility upon man and woman, and would thus make it impossible for a wealthy woman to throw the whole burden of maintenance upon a husband who may be less well off than she. But the average wife and mother has no means of her own; is she therefore to have no responsibility and consequently no rights? That is the point of view which has for so long prevailed, and it is a point of view which is challenged by the women of to-day. A mother's work in the home, it is

1 Brooks *v.* Blount, L.R. (1923), 1 K.B. 257; and 8 Ed. 7, c. 67, s. 38.
2 See Ch. ii, p. 69 *ante*.
3 Guardianship, etc. of Infants Bill, 1924.
4 For example in France. See Code Civil.

asserted, constitutes a contribution to the maintenance of her children as surely as a father's work outside the home does. But the Bill introduced in 1924 made no distinction between the sexes, merely emphasizing the importance of the work done in the home. "In reckoning the liability of the father or mother . . . his or her work shall be deemed as a contribution to maintenance." To-day, we have seen, society assigns to woman the work within the home and to man the work without, and so long as this is the case the contribution to maintenance which he is legally bound to make must, under ordinary circumstances, be a money contribution, the contribution which she is legally bound to make a contribution in kind. But the wording of the section is symptomatic of the tendency of the day. It emphasizes the equality of the sexes, and rightly so, since many women on marriage continue their work outside the home, and both husband and wife may contribute to the maintenance of their children partly in money and partly in work within the home.

The liability of parents to make provision for their children after their death is discussed in another chapter.[1] Here a different aspect of the question claims our attention. So far, we have been discussing the means that the State has adopted and those which it is being asked to adopt for enforcing maintenance at the hands of parents. But the State is doing more than this. It is insisting that maintenance shall be at a higher standard than the income of many parents permits of, thus taking it upon itself to set a standard as necessary for the welfare of children. For this purpose it is supplementing wages earned in the competitive market, sometimes by assistance in money, sometimes by assistance in kind. The Collectivist Philosophy of the second half of the nineteenth century has thus introduced a principle into legislation which was regarded with extreme distrust by the Individualism of the first half of

[1] Ch. iv, p. 143 *post*.

the century.[1] To-day we have admitted that there are many people who cannot, by their own unaided efforts, secure all the conditions necessary for a good life and some of these conditions have been provided at the expense of the community, frequently at the expense of those who do not benefit by them, and in some cases, as for example in education, compelling those for whose benefit they are intended to make use of them.

The State is providing a certain amount of free education, and although to some parents the compulsory education of older children is still regarded as more of a burden than a benefit, to the majority it comes as a free gift which would otherwise have to be paid for. And education, in the narrower sense of the word, is not the only thing provided. Vacation schools, holiday or school camps and nursery schools "for attending to the health, nourishment and physical welfare of children" may be established by Local Authorities, necessitous children may be fed, and certain medical attendance in the schools must be provided.[2] Insured women and the wives of insured men receive a maternity benefit on confinement;[3] benefit is payable in respect of the dependent children of unemployed insured persons, whether men or women, provided the statutory conditions are complied with;[4] if an insured person dies, widow's and orphans' pensions become payable;[5] welfare centres and clinics help mothers in the upbringing of their children, and public institutions, such as wash-houses, constitute wages in kind of real value.[6]

In the history and provision of some of these Acts we have a clear indication of the change which has taken place in the status of women. When the Insurance Bill was first before the

1 Cf. Dicey, "Law and Public Opinion in England"; Jethro Brown, "Underlying Principles of Legislation"; J. M. Keynes, "The End of Laissez-Faire."

2 11 & 12 Geo. V, c. 51, ss. 21, 22, 80–86.

3 1 & 2 Geo. V, c. 55, ss. 18, 19; 3 & 4 Geo. V, c. 37, s. 14; now 14 & 15 Geo. V, c. 38, s. 14.

4 12 Geo. v. c, 7. 5 15 & 16 Geo. V, c. 70.

6 8 & 9 Geo. V, c. 29; 9 & 10 Vic., c. 74.

House women's organizations asked for the inclusion of the maternity benefit and later protested against the suggestion that it should be paid to the man.[1] The money was to be given in respect of a function which was solely a woman's function, to enable her to provide better conditions for herself and her child than she could otherwise have. Why then should it be paid to her husband? Their protest did not go unheeded.[2] The Act of 1913 repealed the clause in the Act of 1911 which enacted that where a wife received the benefit in virtue of her husband's insurance " the benefit [3] shall be treated as a benefit for the husband " and substituted the words " maternity benefit shall in every case be the mother's benefit . . . and where the benefit is paid to the husband he shall pay it to the woman." The Women's Co-operative Guild, which had been active in claiming the benefit for the woman, later placed a scheme for the national care of maternity before the Local Government Board,[4] which issued a circular on July 30th, 1914, to a large extent embodying the various suggestions of the Guild. The Act which gave them legislative sanction, the Notification of Births (Extension) Act was put on the Statute Book in 1915 [5] and was followed in 1918 by the Maternity and Child Welfare Act, which imposed on Local Authorities the duty of establishing Maternity and Child Welfare Committees.[6]

The original Unemployment Insurance Acts did not make any provision for the payment of dependant's benefits, and it was not until 1921 [7] that any was made. The additional payments were introduced as a temporary expedient to meet the obviously greater needs of the man with a family to support. Dependant's allowances were amalgamated with unemploy-

1 *Times* Newspaper, October 31, 1911, p. 13.
2 and 3 As Footnote 2, p. 103.
4 Letters of Working Women. Collected by the Women's Co-operative Guild, 1915.
5 5 & 6 Geo. T, c. 64. 6 8 & 9 Geo. V, c, 29, ss. 1, 2.
7 Unemployed Workers' Dependents (Temporary Provision) Act, 11 & 12 Geo. V, c. 62.

ment benefit by the Unemployment Insurance Act, 1922, and by the Unemployment Insurance Act of 1923 they were made a substantive feature of the scheme.[1]

The principle of widow's pensions had been accepted in many of the Dominions and in the United States of America [2] a few years before the English Act was put on the Statute Book, and for some time supporters of the measure in this country had been actively at work. In 1919 a motion introduced by a member of the Labour party was talked out; in 1920 a Bill had to be withdrawn; in 1921 a second Bill received its second reading; in 1923 a motion was lost, but in February, 1924, the motion introduced by Mr. Dukes "that in the opinion of this House pensions adequate for the proper upbringing and maintenance of children should be paid to all widows with children, such pensions to be provided by the State and administered by a committee of the municipal or county council wholly unconnected with the Poor Law" [3] was carried unanimously. The Bill, which became law in 1925, was introduced in April of the same year by Mr. Neville Chamberlain, then Minister of Health.

The Widows', Orphans', and Old Age Contributory Pensions Act of 1925, with the amending Acts,[4] is a woman's Act *par excellence*. It secures to a widow, provided the statutory conditions are fulfilled, a pension of ten shillings a week with an additional allowance of five shillings for the first or only child and three shillings for all other children under fourteen. Such pension, whether with or without the additional allowances, is called a "widow's pension" and both the sum paid in respect of herself and the sum paid in respect of her children are regarded as the mother's income and are payable

1 Report of the Unemployment Insurance Committee, 1927, First Vol., p. 67; 12 Geo. V, c. 7; 13 Geo. V, c. 2; now —?

2 Mothers' Pensions in U.S.A., Report of Local Government Board, 1918; "Widowed Mothers' Pension," Rhys Davies, p. 4.

3 Parliamentary Debates, Feb. 24, 1924, Vol. 169, p. 1884.

4 15 & 16 Geo. V, c. 70; 20 Geo. V, c. 10; 21 & 22 Geo. V, c. 19; 22 & 23 Geo. V, c. 52, s. 9.

to her[1] unless she has so conducted herself that the Minister directs that it is in the interest of the child that the allowance be paid to some one else.[2] Orphan's pensions[3] at the rate of seven shillings and sixpence for the first or only child and six shillings for the other children under the age of fourteen are payable on the death of their father or widowed mother.[4]

This Act recognizes that the wages of manual workers and of certain other workers are not, under present-day circumstances, large enough to enable them to make adequate provision for their wives and children should they die in early manhood. At the same time the Act emphasizes the desirability of making it possible for a woman to stay in her home in order to give her full time and attention to the upbringing of her young family.[5]

The Act is on a contributory basis, and thus puts into operation the recommendations of one school of thought of which Sir William Beveridge was an eminent exponent. "The funds," he wrote in 1924, "would be provided by contributions from employers, workmen and the State, either under the health or under the unemployment insurance scheme."[6] Indeed, it was hardly to be expected that the advocates of a non-contributory scheme[7] would induce the Legislature to accept their proposal in view of the fact that an insurance scheme with machinery which could easily be adapted to the needs of the new scheme

1 If she remarries only the additional allowances are paid. S. 3 (2).

2 15 & 16 Geo. V, c. 70, s. 6. 3 ss. 1 (b) 4.

4 For the value of these services, *see* the Annual Report of the Ministry of Health and the *Health of the School Child*, published by the Board of Education annually.

5 It was argued that the amounts allowed were insufficient for the purpose, and that 8/- should be allowed for the first child and 6/- for the other children up to the age of 16. *See* Resolution passed by the National Union of Societies for Equal Citizenship; *Times* Newspaper, June 23, 1925; and speeches in the House, May 18th, 1925. Cf. Minimum subsistence figures, p. 113 *post*.

6 *Insurance for All.* "The New Way" Series.

7 Cf. "Widowed Mothers' Pensions," Rhys Davies; "Widows' Pensions," published by the National Union of Societies for Equal Citizenship (now National Council for Equal Citizenship), 1924.

had been working successfully for fourteen years. But the result is that the Act of 1925, like the Health Insurance Acts and the Unemployment Insurance Acts, excludes from its scope the widows and children of men who have not at some time been under a contract of service and, in the case of non-manual workers, have earned more than the specified amount. The argument that most of these men are able to make proper provision for their dependants is not borne out by experience, and the question arises whether the Act should be so amended as to extend the right of becoming a voluntary subscriber to men and women who do not comply with the present requirements.[1]

The Act does not forbid a widow in receipt of a pension to supplement her income by taking up paid work. Some people thought that a prohibition of this nature ought to be inserted, but for the most part it was felt that if this were done family affairs would "then require continual supervision and an inquisitorial method of administration in order to discover whether the widow had found any way of adding to her income."[2] Both on the practical ground of simplifying administration and on the theoretical ground of interfering as little as possible with the right of the individual woman to arrange her own life, the decision embodied in the Act is a wise one.

In this country, as the legislative changes which we have just been discussing prove, we have admitted that the income of the average wage earner has, to some extent, to be supplemented as his family responsibilities grow in order to secure better conditions of life for himself, his wife and his children. In addition, we have, as for example by means of Trade Boards,[3] fixed for

1 The original Act contemplated "the inclusion as voluntary contributors of these persons who, by reason of the fact that they worked on their own account, did not come under the compulsory provisions of the Act. The response . . . showed that there was practically no demand . . . and in 1918 . . ." the present arrangement was made. "Report of Royal Commission on National Health Insurance," 1926, p. 8 and 2596.

2 Rhys Davies, "Widowed Mothers' Pensions," p. 19; Sir W. Beveridge, "Insurance for All and Everything."

3 9 Ed. VII, c. 22.

certain industries minimum rates of wages. Yet the minimum conditions of a good life have by no means been secured to the great mass of citizens. In some countries the principle of a minimum wage which shall cover the subsistence needs of the average family has been accepted. Thus, in the words of a General Order [1] of the New Zealand Court of Arbitration of May 8th, 1922, "The wages paid to a man of average industry and capacity should at least enable him to marry, to live in a decent house, and to provide the necessaries of physical existence for a normal family, while allowing a reasonable margin for contingencies and recreation." In this country there are many who believe that here too wages should be secured to men workers, which, with the aid of the public services already established and possibly extended, should be adequate for the maintenance of an average family.[2]

A second school of thought approaches the question of the "civic minimum" [3] in a different way and propounds a different solution. One of the criticisms which this school levels at the supporters of proposals outlined above is that it is impracticable. Many business men, both in this country and in others, are of opinion that the national dividend, or, if we take industries separately, then the separate industry, cannot

[1] Quoted in the *Ministry of Labour Gazette*, March 23rd, 1923, art. "The Family Wage System."

[2] L. T. Hobhouse, *Elements of Social Justice*, Ch. 7, p. 133; "Living Wage Bill", Second Reading moved by Mr. Maxton, Feb. 6th, 1931; Minority Report of Joint Committee of the Labour Party and the Trade Union Congress, adopted by Trade Union Congress, Sept. 1930. As to what is adequate cf. A. L. Bowley and M. Hogg, *Has Poverty Diminished?* Carr-Saunders and Caradog Jones, *The Social Structure of England and Wales*, Ch. 17; B. Seebohm Rowntree, *The Human Needs of Labour*, p. 129; "Poverty", p. 110; "Atwater-Clark Scale", quoted *How to Abolish the Slums*, p. 126, Sir E. D. Simon; Prof. Mottram, *Six Aspects of Family Allowances*, p. 11. The Report of Committee on Nutritive, published by the British Medical Association in Nov., 1933, deals with foodstuffs only, the terms of reference of the Committee being "to determine the minimum weekly expenditure on foodstuffs which must be incurred by families of varying size if health and working capacity are to be maintained and to construct specimen diets."

[3] Term used by L. T. Hobhouse, *Elements of Social Justice*, Ch. vii.

afford to give to each worker in the country an income large enough to enable him to meet the reasonable needs of a wife and family.[1] Nor indeed, so this second school contends, is it necessary that it should do so since a large proportion of the male workers in each industry are either unmarried, or, if married, have no children, or children who are maintaining themselves.[2] To secure to men with no family responsibilities the same income as is secured to men with such responsibilities is to sanction an unequal standard of life for equal work. Nor would such a system make proper provision for the nation's children, since a wage fixed to provide for the needs of a family of five does not allow for any increase in that family, and each new life over the allotted number of three could be maintained only at the expense of other members of the family. Parenthood, in the eyes of this school, is more than a purely personal affair; it concerns not merely the individual man and woman but the nation; it is a service rendered to the nation, and the parents to whom society has allotted the task of undertaking this service should be in a position to protect the interests of their children. And therefore, from the social point of view, it is erroneous to assert that the wages of the worker must be large enough to enable him to support a family and then to look on with indifference if the income is

[1] "If you were to reduce the income of every person to £250 a year, allowing for necessary saving and taxation, you could at most only raise the wages of those below that amount by about 5s. a week." Sir W. Beveridge, *Six Aspects of Family Allowances*, published by the Family Endowment Society, p. 4. Cf. A. L. Bowley, *The Division of the Product of Industry*; Bowley and Stamp, *The National Income*, 1924; Sir Josiah Stamp, *The Christian Ethic as an Economic Factor*, p. 46, and *Wealth and Taxable Capacity*, Ch. III; Report of the Royal Commission on the Coal Industry, Vol. I, Ch. XII. But see *National Income* by Colin Clark for a criticism.

[2] "The theory of a living wage based on the average family is the greatest statistical fallacy of this or any age," Sir W. Beveridge, *Six Aspects of Family Allowances*, p. 4. Also Leaflet, *Wages Plus Family Allowances*, published by Family Allowance Society. Of course there are dependents other than children, but women have their responsibilities as well as men. Cf. *The Responsibility of Women Workers for Dependents*, by B. Seebohm Rowntree.

diverted to entirely different purposes. For this school there is only one way of dealing satisfactorily with the wage question and that is by some system of 'family allowances,'[1] "the providing for the maintenance of children, and possibly mothers, *directly* instead of *indirectly* (as at present) on the assumption that by the interplay of economic forces and the rough and tumble of wage negotiations, men's earnings will be somehow sufficient for the support of families."[2] The "living wage" would then be the wage necessary for the maintenance of the individual, whether man or woman, children being provided for directly by other means. Family allowances would not be in the nature of a dole but in the nature of earnings. True, the money would be paid for a definite purpose, and society would be entitled to ask that it be spent on that purpose. But has not society already arrogated to itself and is it not more and more arrogating to itself the right to punish parents who are not giving to their children the care and protection which is required of them? True, also, that here and there a man might be tempted to drink more heavily or to idle more persistently if he knew that his children would be provided for. But may we not say with equal truth that the men who are unwilling to supplement a mere subsistence income would, with few exceptions, be quite ready to leave their family to the charity of others or the care of the Poor Law Authorities under present-day conditions? Nor is it likely that the effect on population would be anything but undesirable. Indeed, it is advocated by some biologists as a method whereby to increase the desirable elements of the population. "Apart from luck," said Professor J. B. S. Haldane, "there are two keys to economic success, namely, ability and sterility. So long

1 "The introduction of a system of children's allowances will raise the standard of living if the total wage bill remains unchanged, and may neutralise largely or completely any evil effects that would otherwise result from a fall in wages." Report of Royal Commission on the Coal Industry, p. 162, Cmd. 2600.

2 *The Disinherited Family*, Eleanor Rathbone.

as this is so, ability will tend to marry sterility and able people have fewer children than simpletons. The only cure for this state of affairs is some form of the endowment of motherhood." And again, "the best thing to do from the eugenic point of view would be for the State to make family allowances which would enable the skilled workers of the community to breed in greater population than the unskilled."[1]

Family allowance schemes are already in operation both on the continent of Europe and in the British Dominions.[2] In this country Children's Maintenance Allowances have been paid to the ministers of the Wesleyan Methodist Church for over 150 years and are now being paid in the Primitive Methodist Church, to the clergy of certain dioceses in the Church of England and at the London School of Economics.[3] Various suggestions have been made for extending the system in this country. Some propose making the allowance a charge on industry, a scheme which has found favour abroad, others would put the whole cost on the National Exchequer, and yet others would make family allowances part of a general all-in insurance scheme.[4] The Royal Commission on the Coal Industry, which reported in 1926, recommended that a scheme should be put into operation for that industry, so far without effect.

1 Broadcast Address, 1933, *Biology and some political problems.* Report of address, *Manchester Guardian*, Aug. 7, 1933. Cf. Art. by Dr. R. A. Fisher, *Family Endowment Chronicle*, Vol. I, No. 3, November, 1931; Pro. A. L. Bowley, *Economic Journal*, June, 1924, p. 188–192; Carr-Saunders and Caradog Jones, *Social Structure of England and Wales*, Ch. XX.

2 *Family Allowances in Practice*, H. H. R. Vibart; *Family Allowances Abroad and in the British Dominions*, Family Allowance Society; *Family Allowances*, published by International Labour Office. Studies and Reports.

3 Memorandum on "Family Allowances in the Teaching Profession," Family Endowment Society.

4 *Family Income Insurance*, J. L. Cohen, M.A., *Six Aspects of Family Allowances. See also* "Wages and the Family," P. H. Douglas; Art. by Prof. D. H. Macgregor. "The Financial Side of the Family Endowment," *Manchester Guardian Commercial*, April 14, 1927; "*The Disinherited Family*, Eleanor Rathbone.

Parents' Rights to Maintenance by Child. The Poor Law Act of 1834, as we have seen, enacted that a child is liable for the maintenance of his or her parent or grandparent,[1] should such a person become chargeable. A married daughter was, of course, not so liable, nor did the Act of 1882, which imposed the duty to maintain husband, children and grandchildren out of her separate property, extend the duty to parents and grandparents. This was done by the Married Women's Property Act of 1908.[2] The provisions of that Act and of the Act of 1834 are now re-enacted by the Poor Law Act, 1930.[3]

ILLEGITIMATE CHILDREN

(*a*) *Parents' Right to Custody of Illegitimate Child.* It does not appear that the law in respect of the custody of an illegitimate child has undergone much change since 1837. It is doubtful whether at Common Law the mother of an illegitimate child had ever the same right to custody as had the father of a legitimate child, but in Equity the desire of the mother of an illegitimate child as to custody was primarily to be considered unless it would be detrimental to the child to do so.[4] "In the eyes of the law," said Slessor *L.J.*, in 1931, "such a child is *filius nullius* and has no legal guardians. . . . Yet, while the child is under the age of nurture the mother has a right to possession; generally the Court will prefer the mother to the putative father if there be conflicting claims," and the case of *ex-parte* Knee, where the mother was preferred to the father, although he was in a better position to maintain it, is still good law.[5] The putative father has, it appears, no real right to custody after the mother's death, but he will be preferred to the guardian appointed by the mother except under

[1] Ch. I, p. 18 *ante*.
[2] 8 Ed. VII, c. 7.
[3] 20 Geo. V, c. 17, s. 14(2).
[4] Barnado *v.* McHugh (1891) A.C. 388; Walter *v.* Culbertson, S.C. (1921) 499.
[5] *In re* Carroll (1931) 1 K.B. 317.

special circumstances.[1] The mother, and if she be dead, then the guardian appointed by her, is the person whose consent is required to the marriage of an illegitimate infant.[2]

The name of the mother of an illegitimate child appears on the child's birth certificate; the name of the putative father does not appear except at the joint request of mother and father.[3] A bastard takes both his domicil[4] and his settlement from his mother.[5]

(*b*) *Duty to Maintain Illegitimate Child.* The duty of maintenance falls, in the first place upon the mother, but if she marries, her husband is bound during her lifetime to support her bastard children born before marriage.[6] Legislation has, however, considerably increased the liabilities of the putative father. He may, of his own free will, make a binding contract with the mother to contribute towards the maintenance of the child; he may be compelled to do so by proceedings instituted either by the mother or by the Poor Law Authority.[7] The Poor Law Amendment Act of 1844 was the first of a series which gave to the woman herself a right to force the father of her child to contribute towards its support.[8] When the Bastardy Bill of 1845 was before the House of Lords it aroused a considerable amount of opposition, and one speaker asserted that the Act of the previous year had made "an entire revolution in the principle of the law . . . that principle was vindicated by some on the plea of the hardship of visiting the whole of the

1 *In re* Kerr (1889) 24 L.R. 59; St. Mary Abbott's, Kensington, Guardians *re* an illegitimate child, 4, T.L.R., 63.

2 15 & 16 Geo. V, c. 45. The Court can dispense with her consent if she withholds it unreasonably, s. 9. With this exception the Guardianship of Infants' Act, 1925, does not apparently apply to illegitimate children. Cf. *In re* Carroll (1931) 1 K.B. per Slesser *L.J.* p. 355.

3 Births and Deaths Registration (1874), 37 & 38 Vic., c. 88, s. 7.

4 Udny *v.* Udny (1869) L.R. 1 Sc. & Div. 441.

5 Poor Law Act, 1930. 20 Geo. V, c. 17, s. 85 (1) (b).

6 *Ibid*, s. 14 (2) (3).

7 Bastardy Laws Amendment Act, 1873. 36 & 37 Vic., c. 9, s. 5; Bastardy Act, 1923. 13 & 14 Geo. V, c. 23.

8 Poor Law Amendment Act, 1844. 7 & 8 Vic., c. 101.

punishment of immorality on one of the offenders; but it should be recollected that that was the state in which nature left it . . . the Legislature thinking itself wiser than Providence, held out a remuneration to her for the commission of a crime. . . . We have in these words an accurate reflection of the ideals and beliefs of the day, of the ideals and beliefs which found expression in the Divorce Act of 1857 and in the Contagious Diseases Acts of 1864 to 1868.[2] Yet a different point of view was already beginning to make itself felt. Some supported the Bill on the ground that " there was a strong objection to throwing all the blame on the woman, which had also the serious moral evil attached to it of tending to create in the minds of the men who formed these connexions the idea that the Legislature connived at their faults." [3] The Bastardy Act of 1845 [4] was followed by the Bastardy Laws Amendment Act, 1872,[5] which, among other things, raised the amount for which on order might be made from two shillings and sixpence to five shillings. In 1914 [6] new machinery was introduced, which, by giving to magistrates the power to order that a man's pension and income be attached, and by appointing collecting officers to whom all monies could be paid, greatly extended the rights of women. In 1918 [7] the amount which a man might be called upon to pay was raised from five shillings to ten shillings, and from that to twenty shillings in 1923.[8] The money paid under an order is regarded as the child's income and not the mother's. The order cannot be put an end to by the agreement of the parties, nor does the bankruptcy of the putative father discharge it.[9] But his death does, and arrears are not recoverable

1 Parliamentary Debates, Vol. 81, p. 235 (1845).
2 *See* Ch. VI, p. 163 *post*.
3 *Ibid*, Vol. 81, p. 235 (1845). 4 8 & 9 Vic., c. 10.
5 35 & 36 Vic., c. 65.
6 4 & 5 Geo. V, c. 6. But the Act makes certain pensions only attachable. *See* Appendix.
7 8 & 9 Geo. V, c. 49. 8 13 & 14 Geo. V, c. 23.
9 Griffith *v.* Evans (1882) 46 L.T. 417; Bankruptcy Act, 1914. 4 & 5 Geo. V, c. 59, s. 16 (13), 28 (1).

from his estate.[1] If arrears accrue during his lifetime and he refuses to pay, the magistrates may issue a distress warrant and in default of distress he may be imprisoned for not more than three months. Imprisonment wipes out the arrears, and unless the Court orders otherwise no arrears accrue.[2] We have already seen that a committee has recently been appointed to examine the whole position with regard to imprisonment for non-payment of moneys under affiliation and maintenance orders. An affiliation order may be revoked or varied by a subsequent order made by a Court of Summary Jurisdiction if fresh evidence is produced.[3] But the Court has no power to revoke the adjudication as to paternity, but only that part of the order which relates to payments, though there is some doubt as to whether an appeal lies to Quarter Sessions on the question of paternity.[4] If it be held that no such appeal lies some change of the law is clearly desirable. The arrangements made with other parts of the Empire in respect of the enforcement of maintenance orders [5] have not been made in respect of affiliation orders and if a man acquires a permanent residence abroad he is outside the jurisdiction,[6] and no order can be made.

The various Acts to which we have already referred which

1 *Re* Harrington, Wilder *v.* Turner (1908) 2 Ch. 687.

2 35 & 36 Vic., c. 65, s. 4; Robson *v.* Spearman (1820) 3 B. and Ald. 493; Criminal Justice Administration Act, 4 & 5 Geo. V, c. 58, s. 32 (3).

3 4 & 5 Geo. V, c. 58, s. 30 & s. 37 (2), on the question of appeal to Quarter Sessions.

4 R. *v.* Copestake (1927), 1 K.B., 468. See Appendix.

5 Maintenance Orders (Facilitise for Enforcement) Act, 10 & 11 Geo. V, c. 53.

6 But if the putative father resides in Scotland, proceedings may be taken there under the Summary Jurisdiction Act (1881), 44 & 45 Vic., c. 24, s. 6. For affiliation proceedings procedure *see* Lushington's Law of Affiliation and Bastardy. The application may be made before the birth or within twelve months of the birth, or within twelve months of the putative father's return if he has ceased to reside in England before the birth. The child must be born alive before an order can be made. As to service, *see* Bastardy Laws Amendment Act, 1872 (35 & 36 Vic.), c. 65, s. 4, and R. *v.* Webb (1896), 1 Q.B., 487.

provide for the education and care of children apply equally to illegitimate children.[1] The putative father, however, cannot be charged with wilfully neglecting his child if there have been no bastardy proceedings and the child is not in his custody.[2] The mother of an illegitimate child cannot by contract divest herself of either her rights or duties.[3] The illegitimate children of an insured married man or his wife are entitled to allowances, and the illegitimate orphan children of an insured widow or widower to orphan's pensions if they were residing with the insured person at the time of death.[4] But the orphan children of an insured single man or woman are not entitled to orphan's pensions it appears.[5]

During the late war separation allowances were given to women who had contracted permanent though irregular relationships, and some advocates of family allowances believe that allowances should be given in respect of children of unions which are permanent though not legal, and in respect of a first illegitimate child.[6] On the other hand there are many who do not wish to include the unmarried mother in a scheme which regards motherhood as a national service; to do so would, in their opinion, be to give the sanction of law and society to something which is, by its very nature, an anti-social activity.

(*c*) *Parents Right to Maintenance by Illegitimate Child.*

1 P. 109 *ante*. He may claim compensation under the Workman's Compensation Acts, for the death of either parent or grandparent. 15 & 16 Geo. V, c. 84, s. 4, but not under the Fatal Accidents Act, 1846, 9 & 10 Vic., c. 93.

2 Butler *v.* Gregory (1902) 18 T.L.R. 370.

3 Humphrys *v.* Polak (1901) 2 K.B. 385.

4 Widows' and Orphans' Contributory Pensions Act, 15 & 16 Geo. V, c. 70.

5 *Ibid*. Illegitimate children are "children" for the purposes of the Unemployment Insurance Acts. Maternity benefit is payable to an unmarried woman if she is insured.

6 *Equal Pay and the Family*, by K. D. Courtney and Others, p. 51 (published 1918).

The Poor Law Act of 1930 does not impose the duty to maintain his parents on an illegitimate child.[1]

Legitimation. Until quite recently a bastard could not be legitimated except by Act of Parliament. In all countries whose system of law is based on the Roman, the subsequent marriage of the parents legitimates their children, and when the Bill to effect a similar provision in this country was before Parliament it had a large measure of public support. Some people feared that the proposed change would encourage immorality, but it was more generally felt that the law, as it stood, caused a grave injustice to the innocent child, while its deterrent influence on immorality was of the slightest.[2] The Legitimacy Act, which was put on the Statute Book in 1926,[3] enacted that where the parents of an illegitimate person marry or have married one another, whether before or after January 1st, 1927, and the father was at the time of the marriage domiciled in England or Wales, such marriage renders the illegitimate child legitimate, unless the father or mother was married to a third person at the time of the child's birth. The father's domicil is the material factor; the mother's domicil being quite immaterial. English law also recognizes the legitimacy of a person whose parents have married one another if the father was at the time of the marriage domiciled in a country which permits legitimation by the subsequent marriage of the parents.

Adoption. The Adoption of Children Act 1926,[4] like the Legitimacy Act of the same year, introduced into English law a new principle. A person who has attained the age of twenty-

1 20 Geo. V, c. 17, s. 14. On the death of a bastard the parent and grandparent have a claim for compensation under the Workman's Compensation Act, 15 & 16 Geo. V, c. 84, s. 4, but not under the Fatal Accidents Act, 9 & 10 Vic., c. 93.

2 Parliamentary Debates, 1923, Vol. 160, p. 2414.

3 16 & 17 Geo. V, c. 60.

4 16 & 17 Geo. V, c. 29.

five and is at least twenty-one years older than the infant to be adopted, may now legally adopt a child. But no adoption order may be made on the application of one spouse without the consent of the other spouse, and the consent to the support of the infant, if required, though the Court has power to dispense with such consent. Except under special circumstances an adoption order shall not be made where the sole applicant is a male and the infant in respect of whom the application is made a female.

An adopted child stands, for all purposes except inheritance, in the same relationship to the adopter, as a child born in wedlock. If, therefore, an illegitimate child is adopted by its parent or parents he or she becomes liable for their support.[1]

1 *Ibid*, s. 5. But an adopted child cannot claim compensation for the death of his adopted parent under the Fatal Accidents Act.

CHAPTER IV

WOMAN AS OWNER OF PROPERTY

SINGLE WOMAN

We saw in Chapter I that a *feme sole* had, in 1837, full rights of enjoyment and disposal over her property until she became engaged, but that she could not dispose of her property either by gift or investment without the consent of her intended husband, since that would have been a "fraud on his marital right".[1] We shall see in this chapter that legislation has deprived man of all rights in the property of his wife and in so doing has given to a betrothed woman the full rights of ownership over her property.

MARRIED WOMEN

Rights of Ownership. The beginning of the second half of the nineteenth century saw the first efforts of women to bring about a change in the property laws of England, so far as they affected married women. In 1854 Barbara Leigh Smith, afterwards Mme. Bodichon, published a pamphlet entitled "Laws concerning Women," in which she gave a short account of the actual state of the law, pointing out its injustices and anomalies. The pamphlet was republished with additions in 1856. "We do not say that these laws of property are the only unjust laws concerning women to be found in the short summary we have given, but they form a simple, tangible and not offensive point of attack," she writes,[2] and the words are of interest as showing the methods adopted by these early advocates of women's rights. Between the issue of the first and second edi-

[1] Ch. I, p. 19.

[2] *Laws concerning Women*, by Barbara Leigh Smith, 1856. For an account of the work of Mme. Bodichon's work see *Emily Davies and Girton College*, Barbara Stephen.

tion Miss Smith and Miss Parkes began an organized campaign for the alteration of the property laws. The Law Amendment Society was approached, and the Personal Law Committee took up the question and issued a report in which they proposed that the common law should be entirely superseded and the principles of Equity generally adopted. A married woman, it was suggested, should own as her separate property any property which might accrue to her and have the same rights of disposal as Equity had secured to women of the wealthier class. Signatures throughout the country were collected and in 1856 Lord Brougham brought in a Bill.[1] In June of the same year Sir Erskine Perry, to whose efforts the drawing up of the report was largely due, introduced a motion which called attention to the wrongs of married women. "A very remarkable petition," wrote the *Daily News*, "will be presented this evening to the House of Commons by Sir Erskine Perry. It is the petition of Elizabeth Barrett Browning, Mary Howitt, Mrs. Gaskell, Mrs. Cowden Clarke, Mrs. Carlisle, and others, complaining of the state of the law as it effects the earnings and property of married women, and praying the House to apply a remedy . . . The women have been driven to assert their own rights and we treat their having done so as the precursor of a more equitable and happier era."[2] But the motion met with violent opposition. On the one hand it was contended that a change of this kind would introduce a new principle. "Husband and wife are one . . ." a Member argued, "she ought not to be able to set up a business in defiance of his wishes and conduct it so as not to be liable for his debts."[3] On the other hand those who supported the motion contended that, far from introducing a new principle, it "would enable the law to carry out its own humane principle . . . it would be desirable that the

1 Report published by Married Women's Property Committee.

2 *Daily News*, March 14th, 1856.

3 Parliamentary Debates, June 10th, 1856, Vol. 142, p. 1278.

Common Law should adopt the principles of Equity."[1] The motion was dropped, and a Bill introduced in 1857, again by Sir Erskine Perry. Public opinion, however, was not ready for so drastic a change. The proposed alteration struck at the very roots of the doctrine of the unity of husband and wife, and to many people that was equivalent to striking at the roots of family life. Further, the movement for the emancipation of woman was in its very infancy; women claimed equality but they had not yet proved or justified their claim, and the Member who spoke sarcastically about "strong-minded women and their abstract rights as advocated by Margaret Fuller and Aurora Leigh", who contended that legislation must not break down "the distinguishing character of Englishmen, the love of home, the purity of husband and wife, and the union of one family", reflected public opinion on this matter.[2]

Yet simultaneously with the rejection of the Married Women's Rights Bill some of the injustices under which married women suffered were redressed by the passing of the Divorce Act in 1857.[3] The obvious result of that Act was to facilitate divorce, the less obvious but no less certain result was to accustom the man in the street to a more contractual view of marriage and so to prepare him for a Married Woman's Property Act, which would frankly accept two distinct personalities in man and wife.

The Divorce Act, moreover, gave redress to some of the more flagrant disabilities of women which centred particularly round her inability to own any property, even her own earnings. As the law stood neither a judicial separation nor the desertion of her husband removed the status of coverture in this respect, and it was on this injustice that Mrs. Norton dwelt in her "Letter to the Queen". Mr. Norton had taken possession of all his wife's contracts, of her books, even of things

1 Parliamentary Debates, June 10th, 1856, *supra*.
2 *Ibid*, May 14th, 1857, Vol. 145. Aurora Leigh was published in 1856.
3 20 & 21 Vic., c. 85, and p. 84 *ante*.

bought with her own earnings. "He has a right to everything I have in the world, and I have no more claim upon him than any one of the Queen's ladies-in-waiting"; and again: "I write in the hope that the law may be amended, and that those who are at present so ill provided for to have only Truth and Justice on their side, may hereafter have the benefit of 'Law and Lawyers'." [1]

The Divorce Act of 1857 made the first attempt to secure to married women legal possession of their property. It provided that a woman who had obtained a judicial separation should be "in the same position as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; she can dispose of it as a *feme sole*; and on her decease intestate it devolves as it would have done if her husband was dead"; it provided further that a woman deserted by her husband could apply to a magistrate for an order to "protect any money or property she may acquire by her own lawful industry or property which she might become possessed of after such desertion." [2]

These were substantial concessions, and the fact that such concessions were under discussion as part of the Divorce Bill gave to the opponents of Sir Erskine Perry's Bill a good excuse for demanding its postponement. Thus the *Saturday Review*,[3] a forceful opponent of the suggested changes, wrote: "In the presence of the Divorce Bill which embodies the only parts of Sir Erskine Perry's Bill which are at all reasonable—those which deal with the property of women legally separated—it would be absurd to consider the absurd and abortive proposal."

The action of legislators with regard to the two Bills reflects the prevailing philosophic and social outlook. Men were willing

1 "A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill", by Caroline Norton, 1855.
2 20 & 21 Vic., c. 85.
3 "Caius and Caia", *Saturday Review*, July 18th, 1857.

to redress an injustice once they were convinced that an injustice was being done whoever the sufferer might be, and, when it was pointed out to them, they were willing to recognize that the law of England worked unfairly in so far that it allowed men to shirk their responsibilities towards their wives with impunity. But the social conscience was not yet prepared to sanction any change in the general status of married women, nor to concede any reforms which would make radical alterations in the marital relationship. And among women but a few were demanding those rights and responsibilities for themselves which man claimed as necessary to a full life. Even Mrs. Norton, to whose efforts the Custody of Infants Act and the clauses in the Divorce Act which secured to women rights over their property, were largely due, held that "woman had only one right and that was to protection from those stronger than themselves . . . if men failed them then by the laws. . . . The wild and stupid theories advanced by a few women of 'equal rights and equal intelligence' are not the opinion of their sex. I, for one (I, with millions more) believe in the natural superiority of man as I do in the existence of God. . . . I never pretended to the wild and ridiculous doctrine of equality."[1]

We may notice yet another enactment of 1857. Prior to the Married Women's Reversionary Interests Act, usually called Malins Act, of that year, neither husband nor wife could dispose of the wife's reversionary personal estate; he could not do so because it was a *chose in action* not reduced into possession,[2] and she could not do so because of the disability of coverture. Malins Act provided that a married woman might, with her husband's concurrence, dispose of such estate.[3] The Act did not concede to a woman any rights of property

1 *English Laws for Women*, published 1854, p. 166, and "A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill," p. 98.

2 *See* Ch. I, p. 20 *ante*.

3 20 & 21 Vic., c. 57.

independently of her husband, and it is characteristic of the day in that it removed a disability without conceding any change of status.

After the passing of the Divorce Act we do not hear of any active propaganda for ten years, though the little band of men and women interested in the emancipation of women were busy educating public opinion for the changes which they hoped to effect. The conditions in 1867 were different from those which obtained in 1857. In the first place, the injustice of the law with regard to their earnings weighed far more heavily on women than it had done in 1857, for the simple reason that more women were earning an independent livelihood.[1] The provisions of Equity did not protect them, and even the men who were opposed to any radical change were forced to admit the necessity for legislation of some kind. In the second place, the Divorce Act had accustomed public opinion to look upon marriage as a contract dissoluble under certain circumstances. And in the third place, most important of all, a great change had taken place in women themselves. For some years women had been showing that they were capable of profiting by the more liberal education which had been provided for them, and by 1867 they had gained admission to the Cambridge Local Examinations[2] and had drawn attention to the inferiority of their education by inducing the Commissioners of the Schools Enquiry Commission[3] to include girls' schools in their survey. For some time women had been agitating for, and were about to receive, the municipal

[1] In 1857, the *Saturday Review* wrote as follows in discussing Sir Erskine Perry's Bill: "As things are, the wife is not only elevated but substantially benefited. As soon as it is announced that the duty of providing for a household is to be divided, many a woman will be forced to work who now only enjoys the privilege of being worked for. Heiresses and money-earning wives are the exception . . . and the latter is a class which, if women are alive to their own interests, they will not be too eager to foster." (July 18th, 1857.)—Cf. Ch. vii, pp. 187–214.

[2] Ch. viii, p. 218. [3] *Ibid.*

franchise, and also the right to vote for, and indeed to be elected as, members of the Education Boards.[1] Many of the foremost men of the day had espoused their cause, amongst them Jacob Bright, Henry Fawcett, F. Maurice and J. S. Mill. Mill, who was at that time at the height of his fame, had become an active supporter of every movement for the emancipation of women. We have already had occasion to notice the document which he had signed prior to his marriage with Mrs. Taylor in 1851,[2] and his election to Parliament in 1865 was the signal for great activity on the part of women. In 1867, the year of the first woman's suffrage amendment, Mrs. Butler, Miss Boucherette, Mrs. Gloyn, and Miss Wolstenholme, afterwards Mrs. Elmy, prepared a memorial which they addressed to the Council of the National Association for the Promotion of Social Science, and on the recommendation of the Jurisprudence Department of that body it was decided that a Bill, embodying the same provisions as Sir Erskine Perry's Bill of ten years earlier should be introduced into Parliament.[3] We may note in passing two other changes which the Committee suggested, namely, to make it possible for a wife to apply to a Court of Summary Jurisdiction to enforce maintenance if her husband left her, and to give to Justices the power to grant a separation order in cases of desertion, or drunkenness on the part of either husband or wife.[4] These suggestions, step by step, passed into law, as we have seen in the previous chapter, in 1886, 1895, and 1902.[5]

In April 1868, Mr. Shaw Lefevre introduced a measure into the House of Commons which was supported by John Stuart Mill, Jacob Bright, and Russell Gurney. In the same month a committee, known as the Married Women's Property Committee, with Mrs. Butler as treasurer and Miss Wolstenholme as secretary, was formed, which set to work to educate

1 Ch. VII, p. 199. 2 Ch. II, p. 46 *ante*.
3 Report on Married Women's Property Committee, 1882.
4 *Englishwoman's Review*, April, 1868, p. 418. 5 Ch. II, p. 68.

public opinion and to influence Members of Parliament by means of petitions. Twenty-nine petitions were collected with thirty-three thousand signatures.[1] But the Bill did not get any further than the second reading. It was referred to a Select Committee and then dropped owing to the lateness of the session, to be re-introduced by Russell Gurney in 1869, the same year which saw the publication of Mill's *Subjection of Women*. The second Bill fared no better than the first, and in 1870 a third Bill, again fathered by Russell Gurney, was introduced.

All three Bills proposed to give to a married woman the same rights over her property as belonged to a man or a *feme sole*, though they did not anticipate interfering with the rules of Equity.[2] Equity, as we know, had evolved the doctrine of "separate use" which gave to married women control over their property, though in a roundabout way.[3] As Shaw Lefevre put it when he introduced his Bill in 1868, "the only question was whether to proceed in the direction of the exceptional provisions of Equity, eating into the principles of the Common Law but leaving that law still in the fundamental groundwork of the system, or whether to make a change in the Common Law itself and to give to married woman an absolute property in her own earnings, fortune and savings." He believed "the latter was the true course to take".[4] Parliament thought otherwise. It preferred the method of "eating into the principles of the Common Law", and although in the end little of the original system has been left the process was a slow one and to-day something of the old Common-Law doctrine remains equally with some of the provisions of Equity.

The opposition in the House of Commons from those who

1 Report of Married Women's Property Committee, 1882.

2 *See* Lecture VII, "The Property Disabilities of Married Women," by H. N. Mozley in *The Final Cause of Women*, edited by Mrs. Butler.

3 Ch. I, p. 24.

4 Parliamentary Debates, April 21st, 1868, Vol. 191, p. 1021.

clung to their old beliefs was strong. In all respects their arguments were identical with those which had been adduced every time anyone had sought to alter the status of the married woman. The legislator still feared that his social world would collapse if all married women had possession of their own property, still fancied that it was essential in the interests of woman, of child and of society that he should assert his authority as head of the household and consequently have possession of his wife's property. It still appeared to him that the real emancipation of women could carry with it nothing but the destruction of family life and harmony. Yet the bitterest opponent recognized that woman had grievances which must be remedied; they must be remedied without admitting that she had any rights. "The object," said Mr. Raikes, "of those who supported Mr. Russell Gurney was two-fold, including the recognition of the novel principle of civil equality between the sexes. Imaginary rights were mingled with real wrongs." [1] Various devices were suggested to remedy the evils while leaving intact the old Common Law rights of man. It was suggested that the principle of protection orders first introduced by the Divorce Act in cases of desertion should be extended; Mr. Raikes went so far as to introduce an alternative Bill which proposed that a woman's property should be in trust, her husband being official guardian though he "could be ousted by application to a County Judge."[2] Mr. Gurney's Bill passed successfully through the House of Commons. From the House of Lords it was sent to a Select Committee, from which it emerged amended—amended indeed beyond all recognition. "Mr Russell Gurney's Bill asserted the principle that married women were as capable of holding property as unmarried ones," wrote a disappointed

[1] Parliamentary Debates. May 18th, 1870. Vol. 201. ¶ 888.

[2] *Ibid*, ¶ 893.

feminist paper,[1] "though it limited the right under certain circumstances. The present Act is a compromise between the old common law and Mr. Gurney's Bill, and contains no principle at all." Mr. Gurney's comment as he accepted the Lords' amendments and so sent his Bill to receive the Royal Assent, showed a truer appreciation of the facts: "Legislation could not end with the Bill . . . there would yet remain much to be remedied and principles were admitted which . . . must lead to a fuller and more complete measure." [2]

The Act of 1870 secured to a married woman as her separate property the earnings which she had acquired since the commencement of the Act in any employment carried on separately from her husband or through the exercise of any literary, artistic or scientific skill, certain specified investments, personal property which descended to her as an heiress, the rents and profits of any real estate which came to her in the same way, and any sum of money not exceeding £200 which came to her by will or deed. Any other property was not separate property and the rights over it were vested in her husband according to the Common Law of England.

It is easy to see why Parliament preferred the complicated doctrine of "separate use" as developed by the Court of Chancery to the simpler method of putting a married woman on the same footing as a man or a *feme sole*. As Professor Dicey [4] put it, one reason was that "while many members of Parliament dreaded a revolution in the law affecting family life, their fears were dispelled by the assertion that the proposed change did no more than give to every married woman nearly the same rights as every English gentleman had for generations past secured under a marriage settlement for his daughter on her marriage. The other was that members of

1 *Englishwoman's Review*, October, 1870, p. 246.
2 Parliamentary Debates, 1870, Vol. 203, p. 1488.
3 33 & 34 Vic., c. 93.
4 Dicey, *Law and Opinion in the Nineteenth Century*.

Parliament belonging as they did to the wealthier classes of the community were, though ready to save hard-working women from injustice, determined not to sacrifice the defences by which the Court of Chancery had protected the fortunes of well-to-do women against the attacks of their husbands."

It is more difficult to see why the Act of 1870 should have been the half-hearted compromise that it was. Why, for example, money invested in one place should be a woman's separate property, while that invested in another should belong to her husband, or why a sum of £5,000, left to her under a will should, with the exception of £200, be the property of her husband, while the same sum if coming to her as the next-of-kin of an intestate should be her own. To all intents and purposes legislation had conceded the principle that married women should own their own property independently of their husbands, and the exceptions, though of practical value, seem to us merely an example of the unwillingness of legislators to recognize a principle or to admit that they had introduced a change. The true explanation of the compromise is that it made it possible for our law to retain the legal fiction of the unity of man and wife and the disabilities of coverture. The Act of 1870 did not alter the status of a married woman, as we shall see when we consider its effect on her contractual capacity.[1]

One result of the Married Woman's Property Act of 1870 was to goad on those who sought to secure to a married woman the same property rights and liabilities as belonged to a *feme sole*. The Committee lost no opportunity of bringing before the public the unsatisfactoriness of the Act which had been passed and by means of lectures, petitions, articles and letters to the Press furthered their cause. The following is an amusing story of an experience which befell Mrs. Fawcett when working for the extension of the Act of 1870: "In the

[1] Ch. V.

'seventies I was staying with my father at a time when he had convened in his house a meeting of Liberal electors of East Suffolk. We were working for a Married Woman's Property Bill. . . . I had petition forms with me, and thought the 'Liberal' meeting would afford me a good opportunity of getting signatures to it. So I took it round and explained its aim to the quite average specimens of the Liberal British farmer. 'Am I to understand you, ma'm, that if this Bill passes and my wife have a matter of a hundred pounds left to her, I should have to *ask* her for it?' said one of them."[1]

Already in 1872 an amending Bill, sponsored by the Committee, was introduced into the House of Commons, but it had to be postponed and it was not till 1881 that the question was again debated in Parliament. Like all the measures on the subject which had been introduced since 1857 its object was to obtain full possession of her property for a married woman. Step by step since that date the Common Law rights of a husband over his wife's property had been curtailed, step by step legislative enactments had led up to the logical conclusion of the Married Women's Property Act of 1882. The Bill was introduced into the Lower House in 1881, was referred to a Select Committee and reached the Upper House in 1882 in which year it received the Royal Signature.[2] In November of the same year the Married Woman's Property Committee met for the last time and presented its last report. It had done its work.[3]

The Act carried to its final form the equitable doctrine of "separate use". It secured to a woman married after the commencement of the Act, as her separate property, "all real and personal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage including any wages, earnings, money, and

1 *Women's Suffrage*, by Mrs. Henry Fawcett. People's Books.
2 45 & 46 Vic., c. 75
3 Married Women's Property Committee Report, 1882.

property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband, or by the exercise of any literary, artistic or scientific skill." The property acquired by a woman who married after 1882, whether real or personal, whether a *chose in action* or a *chose in possession*, became her "separate property" in law, as certain kinds of property had previously been her "separate property" in Equity. The Act further gave her the right to dispose "by will or otherwise of any real or personal property as her separate property" and thus made it possible for husband and wife to acquire real and personal property and convey it to each other, an Act of the previous year having already allowed this in respect of real property and *choses in action*.[1]

Equity to a settlement,[2] though it may still attach to the property of women married before 1882, has no significance with regard to the property of women married after 1882, and both paraphernalia and pin-money, though both are still recognized by law, have become of little importance. Paraphernalia consist of personal apparel and ornaments, other than family heirlooms and separate property, of which a married woman has had the use during coverture and they differ from separate property in that they remain the husband's property to dispose of as he wishes during his lifetime, becoming her property only on his death and being liable for his debts at death. Usually articles acquired by a wife are gifts from her husband and are to-day, therefore, her separate property.[4] Again, an allowance made by a husband to his wife is generally intended to be her separate property, but if there is no such intention and the allowance has to be applied for the purposes for which it was intended, namely her dress and pocket money, then it is pin-

[1] Conveyancing Act (1881) 44 & 45 Vic., c. 41, s. 50. Now Law of Property Act (1925) 15 Geo. V, c. 20, s. 72.

[2] Ch. I, p. 20 *ante*.

[3] Ch. I, p. 24 *ante*.

[4] But cf. Rondeau Legrand & Co. *v.* Marks (1918) 1 K.B. 73.

money which she has no power to dispose of. Savings out of pin-money, like savings out of the housekeeping allowance, belong to the husband and not to the wife.[1] Furniture and household articles bought by the husband but transferred by him to his wife are held to be her separate property unless there is evidence of the contrary intention.[2] So too, if a husband deposits money in a bank, or transfers stocks or shares, or purchases property, or makes an investment in his wife's name or in their joint names, a gift from him to her is presumed in the absence of evidence to the contrary,[3] and the property becomes her separate property. But there is no presumption of a gift from wife to husband under similar circumstances, though if a husband who is living with and maintaining his wife receives her separate income with her consent, a gift is presumed in the absence of evidence to the contrary, on the assumption that she has consented to her income being used for her maintenance and as her contribution towards the upkeep of the family.[4]

The Married Women's Property Act of 1882 did not, in every respect, give to a married woman the status of a *feme sole*. It specified where and to what extent she should have such a status, and where it failed to make statutory provision the old Common Law held good. Thus, since 1882, a gift to husband and wife has produced the same result as a gift to any other two people; they take as joint tenants and no longer by entireties, which means that each has control over his or her portion and may dispose of the same. But it was held that the Act in no way affected a gift to husband and wife and a third person, husband and wife still counting as one and taking a half between them.[5] This has now been altered by the

1 Montgomery *v.* Blows (1916) 1 K.B. 899.

2 *Re* Magnus, *ex parte* Salaman (1910) 2 K.B. 1049.

3 *Re* Whitehead, *ex parte* Whitehead (1885) 14 Q.B. 419; *In re* Harrison (1920) 90 L. J. Ch. 186; Gascoigne *v.* Gascoigne (1918) 1 K.B. 223.

4 *In re* Young *v.* Young (1913) 29 T.L.R. 391; See also Mercier *v.* Mercier (1903) 2 Ch. 98; Foley *v.* Foley (1911) I.R. 281. C.A.

5 *In re* Jupp, 39 Ch. d. 148.

Law of Property Act of 1925, which enacts that in case of a gift of land after the coming into operation of the Act, husband and wife shall be treated as two persons.[1] Again, though the Act gave to a married woman the right to act as trustee without her husband's assent and the right to transfer certain species of property particularly referred to[2] it made no mention of her powers of disposal with regard to real property and the Common Law doctrine therefore held good, which it would not have done had a married woman's status been in all respects assimilated to that of a *feme sole*. She could not, as trustee, convey real property without the concurrence of her husband and the separate examination which the Fines and Recoveries Act had still considered necessary. This was not altered until 1907, when the Married Women's Property Act of that year enacted that "a married woman is able, without her husband, to dispose of or join in disposing of real or personal property held by her solely or jointly (whether or not including the husband) with any other person as trustee or personal representative in like manner as if she were a *feme sole*.[3] This section is now included in the Law of Property Act 1925 with the additional clause that "a married woman is able to acquire from her husband as from any other person, and hold any interest in property real or personal either solely or jointly with any other person (whether or not including the husband) as a trustee or personal representative in like manner as if she were a feme-sole; and no interest in such property shall vest or be deemed to have vested in the husband by reason only of the acquisition by his wife.[4]

Neither did the Act of 1882 give to a married woman the full rights of disposal which belonged to a man or a *feme sole*. It enacted that "nothing in this Act contained shall interfere with or affect any settlement made or to be made whether

[1] 15 Geo. V, c. 20, s. 37. [2] 45 & 46 Vic., c. 75, s. 18.
[3] 7 Ed. VII, c. 18, c. 1; now 15 Geo. V, c. 20, s. 170.
[4] 15 Geo. V, c. 20, s. 170.

before or after marriage, respecting the property of any married woman"[1] and it was held that this gave to a husband the power to deal with his wife's property without her consent and put her under disability which in its turn was removed in 1907. The Act of that year declares that "notwithstanding section nineteen of the Married Women's Property Act 1882, a settlement made after the commencement of this Act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age."[2]

Again, it was held in 1887 that the Act of 1882 did not, by implication, remove the disability placed on a married woman by the Gifts for Churches Act, 1803[3] which forbade her to make a gift for the purpose of erecting or providing any church or chapel without her husband's consent. Apparently this disability was removed by an Act of 1891.[4]

Thus we see that legislation has step by step deprived a husband of his rights in the property of his wife though it has not entirely relieved him of the duty of providing her with the necessaries of life, even if she has separate means of her own. We have already discussed the question as to whether or no the marital relationship should give to husband and wife a right to a share in the property or income of the othr. Married women, we saw, are demanding a share in the income of their husbands as the only way in which some economic independence can be secured if they remain in the home, and many people are contending that the most equitable arrangement is to give to both husband and wife equal rights in this respect.

But there is still one respect in which the property of a woman is considered to be the property of her husband. The

[1] 45 & 46 Vic., c. 75, s. 19. [2] 7 Ed. VII, c. 18, s. 2.
[3] 43 Geo. III c. 108.
[4] Mortmain and Charitable Uses Act, 54 and 55 Vic., c. 73, s. 7. Re Douglas (1905) 1 Ch. 279.

Finance Act of 1842 enacted that for income tax purposes the "profits of any married woman living with her husband shall be deemed the profits of her husband",[1] and, in spite of the Married Women's Property Acts, this is still considered the law of this country.[2] For income tax purposes "an incapacitated person" includes a married woman.[3] The liability for payment of his wife's income tax is upon the husband, and he is not entitled to an indemnity from her for the amount of the tax he has paid in respect of her income,[4] and in the case of non-payment the power to distrain extends to the goods and chattels of the husband as well as to the goods and chattels of the wife.[5] Either husband or wife may claim to have a separate assessment but the amount of tax payable by husband and wife together will not be diminished thereby.[6] The Finance Act provides for a marriage allowance and children's allowances.[7]

A change in the present law is demanded by many people, by some on the ground that the denial of her separate personality as a taxable citizen is an injury to the status of a married woman, by some on the ground of the unfairness of the present system to the husband, and by some on the ground of the financial loss which is sustained where the wife's income is more than the total rebate allowed in respect of her. The question was examined by the Royal Commission on Income Tax which reported in 1920,[8] with two exceptions, in favour of retaining the present system. The majority of feminists[9] desire that the law should be altered to put husbands and wives with regard

1 5 & 6 Vic., c. 35.
2 Income Tax Act (1918), 8 & 9 Geo. V, c. 40, Sched. General Rules 16.
3 *Ibid*, s. 237. 4 *In re* Ward (1922), 1 Ch. 517.
5 Income Tax Act (1918), s. 171; Finance Act, 15 & 16 Geo. V, c. 36, s. 15.
6 Income Tax Act (1918) Sched. General Rules 17.
7 Finance Act (1920), 10 & 11 Geo. V, c. 18, s. 18; (No. 2) A. 1931.
8 Report of Royal Commission, 1920, Part III, Sec. VII and Reservations Part III, Cmd. 615.
9 Report of Royal Commission. Dr. L. Knowles in Reservations to Part III.

to the payment of income tax on the same footing as other people. Some people, however, contend that "the family should be retained as the unit of taxation in order that (1) the principle of taxing according to ability may be maintained, (2) the interests of the poorer taxpayer may not be sacrificed, but that there should be separate assessment of incomes and separate liability for payment, coupled with an equal division of rebates".[1] Against this it is argued that the doctrine of "ability to pay" is applied quite arbitrarily to penalize a special class of persons and that the "income tax should not . . . be worked as an engine of social policy by which to carry out hidden bounties. The bounty should be given in the case of children, but should be given where it can be seen, where it can be estimated directly and in a form in which people realize what they are getting."[2]

We have yet to refer to the strangest of all the anomalies which the Married Women's Property Act inherited from the provisions of Equity, the restraint upon anticipation. The Act of 1870, half measure as it was, had not interfered with this creature of Equity, the Act of 1882 deliberately enacted that no such interference should take place: "nothing in this Act contained shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income. . . ."[3] This provision still holds good, and affords to a married woman a protection which may be either an advantage or a disadvantage but which certainly makes her *sui generis* in law. No such limitation is recognized in the case of a man or a *feme sole*. We shall examine the effects of a restraint of anticipation upon woman's responsibility for contracts and torts in the next

1 *Ibid.* Part III, Sec. vi.–xi.; and article by Eva Hubback, *Woman's Leader*, Feb. 7th, 1930.

2 Report of Royal Commission on Income Tax (1920) Reservations to Part iv. Sections vi.–xl., p. 151.

3 45 & 46 Vic., c. 75, s. 19.

chapter. Here we must notice that it prevents her from freely alienating her property, or from anticipating the future rents and profits, though she may, if she is a tenant for life without power of anticipation, exercise the powers conferred by the Settled Land Acts,[1] and by the Settled Land Act of 1925 she may, if she is entitled to land for an estate in fee simple or for a term of years absolute subject to an anticipation, exercise the powers of a tenant for life.[2] A married woman cannot remove the restraint which has been imposed and even the Court may only do so under certain specified circumstances. Thus "where a married woman is restrained from anticipation or from alienation in respect of any property or any interest in property belonging to her, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under a marriage settlement, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent bind her interest in such property."[3]

The change made by the Act of 1882 in a married woman's right to enter into contracts will be considered in the next chapter, but one result of that change may be noted here. Section 11 of the Act enabled a married woman to effect a policy upon her own life or the life of her husband for her separate use. A policy of assurance effected by a man on his own life or by a woman on her own life and expressed to be for the benefit of the surviving spouse and of the children, creates, since 1882, a trust, and the money payable under the policy does not form part of the estate of the insured and is not liable for his or her debts.[4] If the husband or wife for whose benefit the policy was effected dies first the interest in

[1] 45 & 46 Vic., c. 38, s. 61. Now Settled Land Act (1925) 15 Geo. V, c. 18, s. 25.

[2] *Ibid.* s. 20.

[3] Conveyancing Act (1911) 1 & 2 Geo. V, s. 7. Now Law of Property Act (1925) 15 Geo. V, c. 20, s. 169. See Appendix, pp. 263–4.

[4] Married Women's Property Act (1882) 45 & 46 Vic., c. 75, s. 11.

the policy passes on his or her death to the personal representative as part of his or her estate,[1] but if no name is mentioned in the policy then it ensures for the benefit of a second wife married after the date of the policy.[2]

(2) *Disposition by Will.* The Act of 1882 expressly enacted that a married woman should be "capable of . . . disposing by will . . . of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."[3] Yet because a married woman's property was separate in the technical sense which Equity had bestowed on it, the Act did not in fact give her the power of disposal which it gave to a *feme sole*. Property which came to her after the death of her husband was not separate property, and it was therefore held that her will made during coverture did not pass all the property which she was possessed of at her death but only such property as she had owned during her husband's lifetime.[4] Hence the termination of coverture made it necessary for a woman to re-execute and republish her will. By the Act of 1893 this disability was removed, and the will of a married woman made during coverture to-day will pass any property of which she was possessed at the time of her death.[5]

(3) *Devolution of Property on Intestacy.* The Act of 1882 did not affect the rights of a widower where his wife died intestate. Separate estate in Equity ceased to have the character of being "separate" when a woman died, so that her husband acquired possession in the ordinary legal sense according to the rules of Common Law, and the Married Women's Property Act in no way affected this right. He still had his life

1 Cousins *v.* Life Assurance Society (1933) 1, Ch. 126.
2 *Re* Browne's Policy (1903) 1 Ch. 188.
3 Married Women's Property Act (1882) 45 & 46 Vic., c. 75, s. 1.
4 *In re* Price, Stafford *v.* Stafford, 28 Ch. d. 709.
5 Married Women's Property Act, 56 & 57 Vic., c. 63, s. 3.

interest, provided all the necessary requirements were fulfilled,[1] in her estates of inheritance, an absolute right to her leaseholds and *choses in possession* and an absolute right to her *choses in possession* after he had taken out administration.

The rights of a widow were somewhat extended by the Intestates Act of 1890.[2] By that Act where a man died intestate leaving a widow but no children and real and personal property of not more than £500 the whole belonged to his widow absolutely, but if his estate exceeded £500 she took in addition half the remaining personal property absolutely and a third of his real property for life. Where there were children of the marriage her rights were not affected by the Act, and she took, as before, one-third of her husband's reality for life and one-third of his personal property absolutely.

The Administration of Estates Act, 1925, has entirely altered the devolution of property on intestacy. It has abolished the husband's tenacy by the curtesy and the wife's dower and freebench and every other estate and interest of a husband or wife in real estate as to which the husband or wife dies intestate and enacts that "a husband and wife shall, for all purposes of distribution or division . . . be treated as two persons."[3] A widower or widow now takes, after all expenses have been defrayed, the personal chattels of the deceased spouse absolutely, and a sum of £1000 free of death duties. In addition the widow or widower takes, if there are no children, a life interest in the remainder of the estate, if there are children a life interest in one half of the remainder. If the deceased leaves no issue but parents or other relatives who are entitled under the Act, the surviving spouse's interest is a life interest only, but if there are neither issue nor other relatives he or she takes the property absolutely.

The Act of 1925 has also placed mother and father on the

[1] Ch. I, p. 27 *ante*.
[2] Intestates Act (1890), 53 & 54 Vic., c. 29.
[3] Administration of Estates Act (1925) 15 Geo. V, c. 23, s. 45, 46, 47.

same footing with regard to their right of inheritance from their children. If the intestate leaves no issue, then, subject to the rights of the surviving spouse, father and mother inherit in equal shares, and if one is dead then the whole goes to the surviving parent. And, since real and personal property now devolve in the same way, the distinction between sons and daughters is abolished and, on intestacy, male and female issue take in equal shares.

Thus we see that man and wife have been placed in the same position with regard to their rights on the death of the other intestate. But neither husband nor wife is compelled by law to make provision for the surviving spouse and children. To the man this is less of a hardship than to the woman, since her death does not deprive him of his means of livelihood, but if the woman is to devote the best years of her life to domestic duties then she should have her means of livelihood secured to her. It is argued, therefore, that just as husband and wife should be entitled to a share of the income of the other during his or her life so also should they be entitled to a share in the property of the other on his or her death.

A resolution on this question was brought before the House of Lords by Lord Astor in 1928 on the initiation of the National Union of Societies for Equal Citizenship, and in 1931 "The Will and Intestacies (Family Maintenance Bill" was introduced in the House of Commons by Miss Rathbone. It received a Second Reading[1] and was then referred to a Joint Committee of both Houses whose report, though not averse to the proposal that a spouse and parents should be compelled to leave the remaining spouse and children provided for, advised that the Bill as introduced should be dropped. In 1933 a Bill was introduced by Sir Wardlaw Milne which had its Second Reading in December, and which appears to have had general

[1] Parliamentary Debates. 1930-31. Feb. 20. Vol. 248, p. 1641.

support. It enacts that if an application is made within six months from the date of probate, the Court may order payment out of the net estate for the benefit of the surviving spouse or children who are without adequate provision for their proper maintenance, education or advancement in life.[1] This Bill, if it becomes law, will give new considerable powers to a Court of Law and require such a Court to exercise great tact, discretion and understanding. In all directions the tendency is the same. Where husbands and wives disagree there is but one way of securing justice and that is by giving to an impartial, properly constituted body the power of deciding between them.

[1] *See* Appendix p. 263.

CHAPTER V

WOMAN'S POSITION WITH REGARD TO CONTRACTS AND TORTS, AND RIGHT TO GIVE EVIDENCE: 1837 TO THE PRESENT DAY

SINGLE WOMAN

Breach of Promise of Marriage. We saw in Chapter I that an action for a breach of promise of marriage could be brought by either man or woman.[1] But in practice the bringing of such an action was almost entirely confined to women, since, in the words of a member who opposed its abolition, "marriage and a settlement in life were the one object of a woman's life." The first attempt to abolish the breach of promise action was made in 1879 when Mr. Herschell moved "That in the opinion of this House, the action of Breach of Promise of Marriage ought to be abolished except in cases where active pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss." [2] The resolution commented on by the *Englishwomen's Review* in the following words: "If Mr. Herschell's resolution becomes law . . . it may even then be productive of hardship in some cases, but we believe it would be based on a right principle. It has been maintained in the same spirit of 'protection' which dictated the Factory Acts of last year, which goes upon the theory that a woman is not competent to act or judge for herself, that she is, in a degree a 'perpetual infant', or at best a weak, confiding half-witted creature who must have trustees

[1] Ch. I. p. 29.
[2] Parliamentary Debates, May 6, 1879, Vol. 245, p. 1867.

to look after her property and laws to enforce that she does not work too many hours at a time and lawyers to see that her feelings are not injured by being deprived of a husband and protector."[1] The women who in 1879 were working for the emancipation of their sex were above all things anxious to show that they were as able as men to live under the ordinary laws of the land. They were seeking equality with man, and the same rights and opportunities which were thrown open to him, and were as impatient of any legislation which sought to give them a special advantage as of any legislation which imposed a disadvantage. Mr. Herschell's resolution did not become law, and no attempt in Parliament has since been made to alter the law with regard to the action for breach of promise of marriage. It is, however, very generally felt to-day that such legislation is desirable. It is felt that it is in the interest of society as well as in the interests of the individual man and woman that either should be free to withdraw from an engagement which he or she thinks is unlikely to lead to a happy marriage. And so far as the right to sue for damages is confined to women, most people are agreed that to claim damages for injured feelings and disappointed hopes is inconsistent with the changed position of women, inconsistent with the principle proclaimed for so long and to-day generally accepted that marriage is not a form of livelihood but a personal relationship between man and woman.[2]

Slander of Women. Prior to the passing of The Slander of Woman Act a verbal imputation of unchastity or of adultery was not actionable unless special damage had been proved, since, with few exceptions, slander is not actionable *per se*. Already in 1861 Lord Brougham had regretted that an impu-

[1] *Englishwoman's Review*, May, 1879.

[2] For a justification of the action see *Law, Life and Letters*, Vol. I, p. 125, by Lord Birkenhead. Cf. McCardie *J.* judgment in Cohen *v.* Seeler (1926) 1 K.B. 536.

tation of unchastity was not actionable *per se*,[1] and in 1891 the Act making it so was put on the Statute Book.[2] By that Act words spoken and published "which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable. . . ." Obviously, the double moral standard made it unnecessary in 1894, as it makes it unnecessary to-day, for a similar right to be conferred on men; but, as we shall see, the demand for an equal moral standard is seeking expression in law,[3] and the day may come when the right will be demanded, and not merely as a gesture of equality.[4]

MARRIED WOMAN

1. *Right to Sue and be Sued in Contract.* The inability of a married woman to contract was due, as we noted in Chapter I, to the fact that she had no property which she could bind; it was her want of a disposing power, and not, as in the case of an infant, the want of a disposing mind, that made her incapable of entering into a contract.[5] Hence, when Equity devised a plan whereby a married woman could possess and dispose of property independently of her husband, it conferred upon her the right to contract and sue with the corresponding liability to satisfy the debts which she had incurred. Her liability, however, was of a limited and peculiar kind, and, even where there was no restraint on anticipation, so different from that of a man or a *feme sole*, that she never possessed in equity the contractual capacity which either a man or a *feme sole* possessed in law. Nor did the pronouncement of a divorce *a mensa et thoro* remove any of the disabilities of coverture in this respect, and it was not until 1857, when the Divorce Act was passed, that any attempt was made to alter and improve the status of a married woman.[6] Where, under that Act, a

1 Knight *v.* Lynch, 9 H.L. Cas. 577. 2 54 & 55 Vic. c. 51.
3 Ch. 6, p. 179 *post*.
4 Cf. *The Dominant Sex*, 1921, by Drs. W. & W. Vaerting, Eng. Trans. by E. & E. Paul.
5 Ch. I, p. 32 *ante*. 6 20 & 21 Vic., c. 85, s. 21.

protection order had been issued on the ground of desertion, a woman's property acquired after such desertion became her own, with the result that a wife was deemed to be "in the like position in all respects with regard to property and contracts and suing and being sued, as she should be under that Act, if she had obtained a decree of judicial separation", and where a judicial separation had been obtained a wife was "to be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceedings, and her husband is not liable for any of her contracts or engagements or wrongful acts or omissions". The Act of 1858 extended a protection order to an estate to which the wife was entitled in reversion or remainder.[1] Thus the efforts of Mrs. Norton, Mme. Bodichon, Lord Lyndhurst, and others, secured the removal of these disabilities of coverture as they secured the redress of some other grievances. The incapacity to contract disappeared as soon as the power to own and dispose of property was conceded.

Yet although the incapacity to contract, with the concomitant incapacity to sue and be sued rested legally on a married woman's inability to own property, there is good reason for asserting that her inability to own property did rest on the belief in her "want of a disposing mind". Women were thought of as helpless creatures who would certainly get into trouble if left to look after themselves. The very fact that such a doctrine as restraint against anticipation came into existence shows us how little the Legislature or the Courts trusted a woman to look after her own interests. True, single women were not protected against their own folly, but since the abolition of religious houses marriage was so much the aim and end of every girl's existence that women of property would rarely remain single, and in any case they had not, as married women had, a husband and children on whom their folly

[1] 21 & 22 Vic., c. 108.

might react, nor did they stand in such close relationship, as married women did, to someone who had such power and influence over them. And taking all the circumstances into consideration, the power of a man over his wife's person and property, her powerlessness before the law, her lack of education and training as depicted by Mary Wollstonecraft,[1] judicial opinion was probably justified in its belief that woman needed protection, not only against her husband but against herself. When the Married Women's Property Act was before the House in 1868 one member conjured up a terrible picture of an unfortunate man returning home to find his household broken up and his wife in prison where she had been taken for non-payment of her debts. "How," he asked, "could a law which made such a thing possible be in the true interests of women?"[2] "A marriage settlement," another member argued,[3] "was framed not only to protect the wife, but to take care that on her part she does not make away with the property and prevent the children of the marriage from being benefited by it."

The feeling against a full measure of emancipation was, as we have seen, too strong in 1870 to enable Mr. Russell Gurney to carry his Bill, and the Act which was put on the Statute Book was a compromise between his measure and the old Common Law. The Married Women's Property Act of that year brought within the term 'separate estate' property which had not previously been so included, but it hardly changed the status of a married woman.[4] It enacted that a married woman might "maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property . . ."[5] but it did not make it possible for her creditors to sue her in law. Hence,

1 *Vindication of the Rights of Women*, published 1792.
2 Parliamentary Debates, June 10, 1868, Vol. 192, p. 1357.
3 *Ibid.*
4 Howard *v.* Bank of England, 19 Eq., p. 295.
5 33 & 34 Vic., c. 93, s. 11.

the Act did not increase her power to enter into a legal contract. Her creditors still had the same remedy as they had before in equity, that is to say, they could obtain judgment against the separate estate which she owned at the time of making the contract, provided always that she was not restrained from anticipating her income, but they had no claim on any property which might come into her possession after she had entered into the obligation.

With the passing into law of the Married Women's Property Act of 1882[1] the old doctrine as to the legal unity of man and wife as far as it affected property received its death blow. The law, henceforward, recognized two distinct entities, each one owning and having control over his and her own property. The Act gave to a married woman the status of a *feme sole* yet with certain differences. Equity had given peculiar characteristics to the property of a married woman, and legislation took over those peculiarities. In the first place the Act of 1882 has been so interpreted as to confer on a married woman the proprietary liability which she had in equity rather than the personal liability which attaches to the obligations of a man or a *feme sole*. She may enter into a legal contract in exactly the same way as anyone else and can enforce it; it can be declared neither void nor voidable except on ordinary grounds, but the other party to the contract has not the same remedy against her as he would have against anyone else. It was held in 1887[2] that the Act of 1882 had conferred on a married woman a proprietary and not a personal liability, and that the remedy of a creditor could, therefore, be only against the separate property and not against the woman herself. In the second place, the Act, though it enacted that a married woman could be declared bankrupt, added the proviso if "carrying on a trade separately from her husband".[3] This

[1] 45 & 46 Vic., c. 75.
[2] Scott *v.* Morley (1887) 20 Q.B.D., 120.
[3] 45 & 46 Vic., c. 75, s. 1, s-s. 5.

last provision was altered by the Bankruptcy Act of 1913 by which a married woman who is carrying on a trade whether separately or not is subject to the bankruptcy laws, and this clause was re-enacted in the Bankruptcy Act of 1914.[1] But the ordinary married woman who is not in business cannot, even to-day, be made bankrupt; there is still no personal remedy against her, and a married woman who fails to satisfy a judgment is still in the advantageous position that, unlike a man or a *feme sole*, she cannot be arrested under the Debtor's Act.[2] Her separate property alone can be attached.

Further, it was held that since the Act of 1882 gave to a married woman no personal liability, creditors would have no remedy against her if at the time of contracting she had no property at all, or only property subject to a restraint upon anticipation, although if she had property her contract would bind not that alone but any other of which she might later become possessed. Such a provision naturally hampered her power to contract and was the occasion of grave injustice to the creditors of an unscrupulous woman. The defect was remedied by the Act of 1893 which enacted that "every contract hereafter entered into by a married woman, otherwise than as agent (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such a contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to."[3]

But the strangest feature taken over by legislation from Equity was, as we have already noted, the restraint against

[1] 3 & 4 Vic., Geo. V, c. 34, s. 12 (1), and 4 & 5 Geo. V, c. 59, s. 125.
[2] 32 & 33 Vic., c. 62.
[3] 56 & 57 Vic., c. 63, s. 1.

anticipation.[1] Restraints against anticipation are to-day still quite common in marriage settlements or other bequests, and in their operation they both hamper a woman by restricting her power of disposal and give her an unfair advantage by relieving her from a liability to pay a just debt. We have already dwelt on the peculiar protection which the doctrine conferred, and explained how even the proprietary liability of a married woman in Equity could be further limited by its operation. She cannot to-day legally bind the future income of any property upon which such a restraint has been placed. If, to take an example, she has investments subject to restraint, which bring her in £50 per quarter; if, at the beginning of the quarter she enters into a contract and an action is afterwards brought to recover the amount due, and if by that time she has spent on other things the money which she owned at the time the contract was made, then her creditors are powerless; they have no redress, since the next quarter's £50, even though it has fallen due before the date of judgment, cannot, by the Act of 1893, be touched.[2] But the money due at the time the contract was made, even though it had not actually been paid to her, may be taken in satisfaction of the claim.[3] Under some circumstances, as we have seen,[4] it is within the power of the Court to remove the restraint, where, for example it is in the interests of the woman that it should be removed, or again in the case of bankruptcy; or where she herself institutes frivolous proceedings, or where it is equitable to indemnify a trustee who commits a breach of trust at her instigation through no fault of his own.[5] But no action of her own can free her from the restriction thus imposed.

There is yet another instance in which the Married Women's

1 45 & 46 Vic., c. 75, s. 19.

2 Barnett *v.* Howard (1900) 2 Q.B. 784; Wood *v.* Lewis (1914) 3 K.B. 85.

3 56 & 57 Vic., c. 63, s. 1. 4 Ch. IV, p. 142.

5 1 & 2 Geo. V, c. 37, s. 7; 4 & 5 Geo. V, c. 59, s. 52.

Property Acts have placed a married woman in a different position from a man or a *feme sole*. "Every contract," says the Act of 1882, "entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown."[1] Since most married women did not enter into contracts as principal but usually as agent an unfair presumption was thus created, and this was altered by the Act of 1893 which enacted that "Every contract entered hereafter into by a married woman otherwise than as agent shall. . . ."[2] How do the words "otherwise . . . than as agent" affect the contractual liabilities of a married woman? She has, as we have noted more than once, a presumed authority to bind her husband's credit, and, unless in one way or other he has rebutted the presumption, he is held responsible for such contracts. Does the fact that she has separate property of her own constitute such a rebuttal without express dissent on his part; if not what conditions must be satisfied in order to make the husband rather than the wife liable for the debt, to give her that character of an agent rather than the character of a principal? The first question we have already answered in the negative. Unless a man has withdrawn his authority his wife may pledge his credit for necessaries in spite of the fact that she has means of her own.[3] The second question was answered in 1906 in the well-known case of Paquin *v.* Beauclerk.[4] The dispute centered round the meaning of the word 'as' in the Act of 1893, for the Law Lords were divided in their opinion as to whether a married woman, in order to constitute herself her husband's agent must make her character as agent known to the other contracting party, or whether her husband's assent would be sufficient. Under the ordinary law of agency the husband's permission to contract would not absolve her from liability. "If an agent," said Lord Robertson, who with Lord

[1] 45 & 46 Vic., c. 75, s. 1, s-s. 3. [2] 56 & 57 Vic., c. 63, s. 1.
[3] Ch. II, p. 13. [4] (1906) A.C. 148.

Atkinson dissented from the judgment given, "contracts without disclosing that he has a principal, he is himself the person *prima facie* responsible." In the above-mentioned case Mrs. Beauclerk had ordered clothes, and in due course had paid for them with her own cheques without disclosing that she was acting as her husband's agent or that the money was provided by him. One day the account was not met, and on being sued, her defence was that she had been contracting as her husband's agent, he in the meantime having passed through bankruptcy. Her defence was held to be good, and in the words of the Lord Chancellor: "The only decisive question is whether the defendant made this contract as agent for her husband, or, to put the same thing in other words, had she his authority, express or implied."

Looked at from the point of view of a man's liability for his wife's necessaries, a point of view which the Married Women's Property Acts have in no way affected, the judgment seems logical enough. There is a presumption of fact that a woman has her husband's authority to pledge his credit unless he has withdrawn it, and in that respect the law of agency has been modified to meet a particular case. Further, she is presumed to have that authority, as we have seen, even though she has property of her own. But the position is an unsatisfactory one as well to the husband as to the woman and the party with whom she is contracting. It arises out of the fact that the ordinary married woman living at home as housekeeper has no means of her own, and therefore contracts as agent and not as principal. If, as many people hope, the work of a wife as housekeeper becomes recognized, and remuneration attached to it, we may expect that her liability on a contract will change too, so that she will be held responsible for every debt she incurs, in the same way as a man or a *feme sole*.

With regard to ante-nuptial debts of a married woman the

Act of 1870 made her, or rather her separate property, "liable to satisfy such debts," and it was held that this section referred to all separate property, whether subject to a restraint on anticipation or not, while it absolved her husband from all liability.[1] But since the husband retained the greater part of his wife's property, such a provision might deprive those creditors, who had entered into a contract with a woman prior to her marriage, of their just claim, and an amending Act was therefore passed in 1874, which made a husband liable for his wife's ante-nuptial debts to the extent of the property which he had received with her, so that husband and wife married after the passing of the Act might "be jointly sued for any such debt".[2] And now, by the Act of 1882, a woman "shall continue to be liable in respect and to the extent of her separate property for all debts contracted and all contracts entered into . . . before her marriage" while "no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage."[3] The Act further declared that a husband should be liable for his wife's ante-nuptial debts "to the extent of all property belonging to his wife which he acquired", so that both husband and wife may be jointly or severally sued in respect of such debt or contract.[4]

2. *Right to Sue and be Sued in Tort.* The Act of 1870 made no reference to a woman's right to sue or be sued in tort and her position in that respect, therefore, underwent no change. With the passing of the Act of 1882 the whole question of procedure as it affected a married woman was changed. "A married woman," says the Act, "shall be capable of . . . suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need

1 33 & 34 Vic., c. 93, s. 12, and Sanger *v.* Sanger, L.R. XI, Eq. 470.
2 37 & 38 Vic., c. 50, ss. 1 and 2.
3 45 & 46 Vic., c. 75, ss. 13 and 19. 4 *Ibid*, s. 14.

not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in such action or proceeding shall be payable out of her separate property and not otherwise,"[1] and it appears that, in the case of torts, income due and payable at the date of judgment may be taken to satisfy the judgment, even though she were restrained from anticipating it at the date when the tort was committed.[2] A married woman has now, therefore, full rights and liabilities with regard to torts committed by or against her during marriage. Yet it has been held that the Act has not absolved a husband of his common-law responsibilities for her torts unconnected with contracts, and a plaintiff may to-day choose whether he will sue a married woman alone or join her husband with her.[3] This liability of a husband for the wrongs committed by his wife dates back to a day when a married woman had practically no existence in law, to the day when the law regarded husband and wife as one, conferring on him all the rights and imposing on him all the duties which such a unity carried with it. For some time after the passing of the Married Women's Property Acts many of the liabilities of coverture remained; the municipal franchise, to take one example, was not granted to a married woman when it was granted to the *feme sole*, and it is not surprising that the Act of 1882 should have been thus interpreted. Yet in 1909 Lord Moulton, though bound to follow the earlier decision, gave it as his opinion that the Act of 1882 had been wrongly interpreted, since the husband's liability rested on the inability of the wife to be sued alone, an inability which that Act removed. To-day it is very generally felt that a husband ought

[1] 45 & 46 Vic., c. 75, s. 1. [2] Hood-Barrs *v.* Heriot (1896), A.C. 174.
[3] Seroka *v.* Kattenberg, 17 Q.B.D. 177; Earle *v.* Kingscote (1900) 2 Ch. 585; Cuenod *v.* Leslie (1909) 1 K.B. 880; Edwards *v.* Porter (1925), A.C. 1.

to be relieved of all responsibility for the torts committed by his wife. " It is satisfactory to find," writes the Vinerian Professor, commenting on Edward *v.* Porter, " that Scrutton, *L.J.*, would have liked, if he had been free to do so, to follow the *dicta* of Fletcher Moulton, *L.J.*, in Cuenod *v.* Leslie and to hold that a husband is only liable for his wife's torts if she acts as his agent. It remains for the House of Lords to uphold these *dicta*, as, in the past, they have upheld many other judgments of the same learned Judge."[1] The House of Lords, however, approved the cases of Seroka *v.* Kattenberg and Earle *v.* Kingscote, disapproving the opinion of Fletcher Moulton, *L.J.*,. and an Act of Parliament is required to effect the alteration. A Bill was introduced under the Ten-Minutes' Rule in December 1930, which proposed to relieve a husband of all liability for his wife's torts, but it was not proceeded with.[3]

With regard to the ante-nuptial torts of a woman the Act of 1882 placed a husband in exactly the same position as he was in with regard to her ante-nuptial debts and contracts[2]. But the wife herself is in a slightly different position. She is indeed, after marriage " liable in respect and to the extent of her separate property for all . . . wrongs committed by her before marriage ", but the section which makes property to which a restraint was attached liable under certain conditions to satisfy a debt incurred before marriage makes no mention of torts, and it appears that in this respect the restraint would be effective.

The whole situation is anomolous, and the day cannot be far distant when the restraint on anticipation, the liability of a man for his wife's torts and ante-nuptial debts, along with the doctrine of coercion and the remaining privileges and disabilities of coverture, will be removed 5om our law as utterly inconsistent with the present status of women. A committee to consider, among other things, the liability of a husband in

1 The Law Quarterly Review, Jan. 1924.
2 Edwards *v.* Porter (1925), A.C. 1.
3 Parliamentary Debates, Dec. 1930, Vol. 246, p. 231.

the torts of the wife was established by the Lord Chancellor in January, 1934.

We saw in Chapter I that a husband and wife could enter into a contract in Equity though they could not do so in law. The Married Women's Property Act of 1882 made a legal contract between them possible, and gave to each the right to sue the other in contract.[2] Yet, with one exception, they cannot sue each other in tort, and in making that exception the Act of 1882 again operated to give to a married woman an advantage which her husband did not possess. She may now, under the Act of 1882,[3] bring an action against him for the protection of her separate estate while he cannot under any circumstances bring an action in tort against her.[4] And under this section it is held that under certain circumstances an order may be granted restraining a husband from entering his wife's house which she owns as her separate property, though while considering the question of the separate property of a wife the Court must also regard the duties of the spouses to each other.[5] A husband may, unless he has thus forfeited his right, enter premises belonging to his wife in the exercise of his marital right to *consortium*.[6]

The communication of a libel by a writer to his wife is not publication.[7] On the other hand it is publication to make a statement to one spouse regarding the other.[8] And one strange anomoly which comes to us from the days when a wife was regarded as being under the control of her husband is apparently

[1] 45 & 46 Vic., c. 75, s. 14. [2] *Ibid*, s. 12.
[3] *Ibid*, and Allan *v.* Walker, L.R. 5 Ex. 190 (1930); 2 K.G. 238.
[4] R. *v.* Smyth I.M. and Rob. 155. But where a question between husband and wife in respect of property arises either party may, under s. 17 of the Married Women's Property Act, take summary proceedings to have it decided.
[5] Shipman *v.* Shipman (1924) 2 Ch. 140.
[6] Gaynor *v.* Gaynor (1901) 1 I.R. 217. 2 Ch. 140.
[7] Wennhak *v.* Morgan (1888) 20 Q.B.D. 635.
[8] Watt *v.* Longsdon (1930) 1 K.B. 130. The making known of a libel or slander to any person other than the object of it is publication in the legal sense.

still good law. A husband whose wife has knowledge of the viciousness of a domestic animal is himself held to have that knowledge so as to be legally liable if the animal harms a third person.[1] On the other hand, if the knowledge is the husband's a wife has no responsibility unless of course it be proved that she was in fact aware of the animal's character.[2]

(3) *Competency of Husband and Wife to Give Evidence.* We have seen that at Common Law neither husband nor wife could give evidence for or against the other. This disability was removed in 1853 by the Evidence Amendment Act of that year which enacted that in civil proceedings a husband and wife should be competent and compellable to give evidence,[3] except in proceedings instituted in consequence of adultery. This exception was abolished in 1869 by the Act which provided that husband and wife should be competent witnesses in proceedings instituted in consequence of adultery, provided that they should not be compelled to answer questions tending to prove their guilt.[4] Neither husband nor wife can be compelled to disclose any communications made by the other during marriage.[5]

1 Gladman *v.* Johnson (1867) 156 T.R. 476.
2 Miller *v.* Kinibray (1867) 16 L.T.R. 360.
3 16 & 17 Vic., c. 83, s. 1. 4 32 & 33 Vic., c. 68, s. 3.
5 16 & 17 Vic., c. 83, s. 3.

CHAPTER VI

WOMAN UNDER THE CRIMINAL LAW FROM 1837 TO THE PRESENT DAY

We saw in Chapter I that woman's position under the criminal law differed from man's in certain respects, and we have now to examine the changes which have taken place since 1837.

(1) *Offences against Public Order.* The old Act of Edward III which is still on the Statute Book,[1] gave, it appears,[2] to justices of the peace the right to require sureties for good behaviour from women coming under the category of "night-walkers". The Vagrancy Act of 1824, which enacted that "every common prostitute wandering in the public streets or public highways or in any place of public resort and behaving in a riotous or indecent manner may be imprisoned for one month",[3] though it did not make prostitution in itself an offence against public order, did discriminate against women, and in the Metropolitan Police Act of 1839, and the Towns Police Clauses Act of 1847, this discrimination found further expression. The Act of 1839[4] which applied only to London, enacted that "every common prostitute or night-walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers may be summarily convicted and fined £2," and the Act of 1874[5] which applied to towns outside Lon-

1 34 Ed. III, c. 1. Stone's "Justices Manual" under "Surety for Good Behaviour."

2 See Ch. I, p. 35. 3 5 Geo. IV, c. 83, s. 3.

4 2 & 3 Vic., c. 47, s. 54 (11).

5 10 & 11 Vic., c. 89, s. 28.—These provisions are included in the Public Health Act 1875

don, had a similar provision. "Every person who in the streets to the obstruction, annoyance or danger of residents and passengers commits any of the following offences shall be liable to a penalty not exceeding 40s. . . . or . . . may be committed to prison for a period not exceeding 14 days . . ." namely, "every common prostitute or night-walker loitering and importuning passengers for the purpose of prostitution".

Prostitution in itself was no offence, prostitution accompanied by solicitation was no offence unless done to the annoyance of passengers; solicitation, however annoying, by anyone other than a common prostitute, was no offence. The law did not punish an immoral woman for her immorality; on the other hand, conduct which on her part constituted a breach of the law could be indulged in with impunity by other members of the community. Public opinion accepted one moral code for men and one for women, and law here as elsewhere reflected public opinion.

In 1864 this acceptance of a double moral standard received the sanction of law in a new way. Hitherto immorality on the part of man, however much it had been accepted by the social conscience, had not been recognized by law, but this recognition was given in 1864 when the First Contagious Diseases Act "for the prevention of contagious diseases at certain naval and military stations" was put on the Statute Book.[1]

The Act was renewed in 1866[2] after a brief debate in the House of Commons in which two members spoke against it. It was, said Mr. Ayrton, "simply a bill for keeping public women at the public expense for the gratification of our soldiers and sailors."[3] The Act gave to a Justice of the Peace before whom "an information on oath had been laid by a superintendent of police . . . that the informant had good cause to believe that the woman therein named is a common prostitute

[1] 27 & 28 Vic., c. 85. [2] 29 & 30 Vic., c. 35.
[3] Parliamentary Debates, March 22, 1866, Vol. 182, p. 815.

and either is resident within the limits of any place to which the Act applies . . . or has been within the limits for the purpose of prostitution . . ." the power to "order that the woman be subject to a periodical examination by the visiting surgeon for any period not exceeding one year." It also gave to the visiting surgeon the power, where necessary, to detain her in a certified hospital. The penalty for refusing to comply with the regulation was "imprisonment with or without hard labour in the case of a first offence for a term not exceeding one month, and in case of a second and subsequent offences for any term not exceeding three months". The Act was extended to eighteen towns in 1869,[1] and in the same year the agitation for the repeal of the legislation was begun.

From the very outset there had been opposition to the Contagious Diseases Acts on the part of certain religious bodies and social workers and some medical men, but public opinion on the whole was either actively in favour[2] or absolutely indifferent. Not until 1869, when Josephine Butler set out on her "great crusade" was the matter forced on the attention of the British public. "The utmost apathy prevailed," wrote Daniel Cooper, the secretary of the Rescue Society; "people would not believe our words and would not stir . . . the ladies of England will save the country from this fearful curse. . . . Go on, give the country no rest till the law is abolished. . . . But for the Ladies' National Association we should have had no discussion and the Acts would by this date have probably been extended throughout the country."[3] The National Anti-Contagious Diseases Acts Association and the Ladies' National Association for the repeal of the Contagious Diseases Acts were formed at the end of 1869, and on December 31st the appeal was issued by

1 32 & 33 Vic., c. 96.

2 Some of the feminists of the day were actively in favour, among them Dr. Elizabeth Garrett Anderson and Emily Davies.

3 Quoted in *Memoir of Josephine Butler*, edited by Mr. and Mrs. Johnson, p. 89, 3rd ed. *Personal Reminiscences of a Great Crusade*, Josephine Butler.

the Ladies' Association, signed by over a hundred and twenty women, amongst whom were Florence Nightingale, Harriet Martineau and Josephine Butler. The manifesto is worth quoting: "We, the undersigned, enter our solemn protest against these Acts. (1) Because, involving as they do such a momentous change in the legal safeguards hitherto enjoyed by women in common with men, they have been passed not only without the knowledge of the country, but unknown in a great measure to Parliament itself; and we hold that neither the representatives of the People nor the Press fulfil the duties which are expected of them, when they allow such legislation to take place without the fullest discussion. (2) Because, so far as women are concerned, they remove every guarantee of personal security which the law has established and held sacred, and put their reputation, their freedom, and their persons absolutely in the power of the police. (3) Because the law is bound, in any country professing to give civil liberty to its subjects, to define clearly an offence which it punishes. (4) Because it is unjust to punish the sex who are the victims of a vice, and leave unpunished the sex who are the main cause both of the vice and its dreaded consequences; and we consider that liability to arrest, forced medical treatment, and (where this is resisted) imprisonment with hard labour, to which these Acts subject women, are punishments of the most degrading kind. (5) Because by such a system the path of evil is made more easy to our sons, and to the whole youth of England, inasmuch as a moral restraint is withdrawn the moment the State recognizes, and provides convenience for, the practice of a vice which it thereby declares to be necessary and venial. (6) Because these measures are cruel to the women who come under their action—violating the feelings of those whose sense of shame is not wholly lost, and further brutalising even the most abandoned. (7) Because the disease which these Acts seek to remove has never been removed by any such legislation.

The advocates of the system have utterly failed to show, by statistics or otherwise, that these regulations have in any case after several years' trial, and when applied to one sex only, diminished disease, reclaimed the fallen, or improved the general morality of the country. We have on the contrary the strongest evidence to show that in Paris and other continental cities where women have long been outraged by this system, the public health and morals are worse than at home. (8) Because the conditions of this disease in the first instance are moral, not physical. The moral evil, through which disease makes its way, separates the case entirely from that of the plague, or rather scourges which have been placed under police control or under sanitary care. We hold that we are bound before rushing into experiments of legalizing a revolting vice to try to deal with the *cause* of the evil; and we dare to believe that with wiser teaching and more capable legislation, those causes would not be beyond control." The appeal aroused immediate attention. "Your manifesto," wrote a Member of Parliament to Mrs. Butler, "has shaken us very badly in the House of Commons. A leading man in the House remarked to me: 'We know how to manage any other opposition in the House or in the country, but this is very awkward for us—this revolt of the women. It is quite a new thing. What are we to do with such opposition as this?"[1]

The opposition aroused against the Abolitionists was intense. For some years the Press maintained what has been called "a conspiracy of silence", and attempts were made to break up the meetings of those who spoke against the Acts.[2] But in spite of persecution the agitation continued and gathered force. At by-elections the question of the repeal of the Contagious Diseases Acts assumed enormous importance for the Abolitionists succeeded in making it a live issue. In 1870, first at Newark and then at Colchester, the Government candidate, Sir Henry

[1] Quoted in Memoir *supra*, p. 94. [2] Quoted in Memoir *supra*, p. 96.

Storks, was defeated on that issue alone,[1] and in 1872 opposition was organized against the candidature of another Government nominee, Mr. Childers, who obtained his seat by a small majority.[2] In 1870 a Bill for repeal was brought in, and in 1871 a Royal Commission to examine into the working of the Acts was appointed before which Mrs. Butler, "the only woman before a large and august assembly", was called to give evidence.[3] A Minority Report, in favour of complete repeal, and a Majority Report, which recommended the continuance of the Acts but the abolition of the clause dealing with compulsory examination were published, and in 1872 the Government brought in a Bill to repeal the existing Acts and to substitute a new one embodying the recommendations of the Majority Report.[4] It was thought by some that the proposed alteration would do away with the objections to the Acts, but strenuous opposition was offered by those who were working for complete repeal, and in her "Letter on the subject of Mr. Bruce's Bill", Mrs. Butler made a strong appeal against compromise of any kind. The Bill was withdrawn, and in 1873 a second attempt was made to remove the Acts from the Statute Book. Speaking in favour of the Acts a Mr. Lewis asked: "What was the character of the evidence produced on the other side? They had some great *a priori* reasoners, if the term reasoner can be allied to such a lady as Mrs. Butler. They had a great philosopher . . . who . . . occasionally inclined to express strong opinions on social and political questions which he had not maturely considered—I mean Mr. John Stuart Mill. . . ."[5] The point of view of the Abolitionists was put by Mr. Henley, one of the two members who had voted against the Act of 1866. "It is complained," he said, "that this agitation is carried on by women . . . but we cannot shut our eyes to the fact that women are most affected by this legislation. We men do not know

1 Quoted in Memoir, p. 102.
2 *Ibid*, p. 121.
3 *Ibid*, p. 109.
4 *Ibid*, p. 120.
5 Parliamentary Debates, May 21, 1873, Vol. 216, p. 263 *sequit*.

what women suffer. If they do not tell us we cannot know."[1] Here, as in every other sphere as our study has shown us, woman had to become articulate, had to make known her needs and her grievances. In the words of Josephine Butler: "It is only when the slave begins to move, to complain, to give signs of life and resistance either by his own voice or by the voice of one like himself speaking for him that the struggle for freedom truly begins. The slave now speaks. The enslaved women have found a voice in one of themselves. . . ."[2] On a division being taken there was a majority of 137 in favour of retaining the Acts, a fact which sent Mr. Henley, who had hitherto been opposed to the extension of the suffrage to women, into the lobby with the suffragists a little later in the year.[3]

In 1874 Mrs. Butler left England for a tour on the Continent in order to get in touch with Abolitionists abroad. She returned to England in 1875 and in that year was formed "The British, Continental and General Federation for the Abolition of Government Regulation of Prostitution", which held its first Congress in 1877 in Geneva. Into the activities of the various sections of that Congress it is not our business to enter,[4] but to one small episode we may be allowed to call attention. A young Swiss jurist who, at the beginning of the Congress was strongly opposed to the abolition of the laws for the regulation of prostitution had, by the end of the Congress changed his views. "He had imagined . . . that we were a number of 'fanatical and sentimental women', but 'when he heard women arguing like jurists, and even taking part against each other, and yet with perfect good temper, *like men* (!) he began to see that we were grave, educated, and even scientific people.'"[5] Each right which woman demanded she sought as an end in itself, yet each was the means to the realization of the other. Not an injustice here or an injustice there, but a whole conception of

1 *Ibid.* 2 *Memoir* of Josephine Butler, *op. cit.*, p. 150.
3 *Memoir*, *op cit.*, p. 127. 4 See *Memoir*.
5 *Memoir*, *op cit.*, p. 163. Italics are Mrs. Butler's.

womanhood had to be attacked, a conception in which all inequalities and injustices found their justification. "This year," wrote Mrs. Butler later of 1873, "was also marked by the fact that several other movements were inaugurated which resulted in very important reforms. These movements were begun and carried through by groups of the same persons who had risen against the regulation of vice. . . . We felt that it was necessary . . . also to work against all those disabilities and injustices which affect the interests of women."[1]

In 1880, on the publication of certain information referring to the treatment of English girls in licensed houses in Brussels, public opinion in England began seriously to concern itself with the question of the relationship of the State to immorality, and in 1883 two Bills dealing with the subject were before Parliament, the Criminal Law Amendment Bill introduced into the House of Lords and the Bill for the Repeal of the Contagious Diseases Acts in the House of Commons. In the country the friends of abolition worked hard to organize public opinion. "Our friends are active in every nook and corner of the country: even from the remote villages petitions come pouring in";[2] and on April 20th Mr. Stansfeld moved his resolution—"That this House disapproves of the compulsory examination of women under the Contagious Diseases Acts."[3] On the medical question those who believed in the beneficial effects of the Acts were opposed by those who asserted that such benefits were entirely illusory. On the moral question two views as to the respective rights of men and women joined issue. "It is said," argued a Member in favour of retaining the Acts, "that you must inflict considerable injury upon those women. But then those women are inflicting a great injury on society."[4] "I, for one," argued a Member in favour of

1 But many women refrained from taking an active part in more than one reform, believing that by so doing they were best serving the cause they had most at heart. Cf. *Millicent Garrett Fawcett*, by Ray Strachey.

2 *Memoir of Josephine Butler*, p. 173.

3 Parliamentary debates, Ap. 20, 1883, Vol. 178, p. 749. 4 *Ibid*, p. 817.

abolishing the Acts, " . . . am not satisfied that the beneficial material results of these Acts have been made out. . . . It is not, however, on the physical question only that I base my hostility to these Acts. . . . The first respect in which they offend is their miserable injustice as between men and women. The whole view of life and society upon which this wretched legislation rests loses sight of the fact that impurity is as infamous in a man as in a woman."[1] The arguments were similar to those which had been used before, but the voting in 1883 was different from the voting in 1873. On a division being taken the resolution was carried by a majority of 72, and in May of that year the operation of the Contagious Diseases Acts was suspended. Between 1883 and 1886 the repealers worked hard; in 1885 a petition "signed by two hundred Members of Parliament on both sides of the House, adjuring the Government to give immediate attention to this question as the patience of the people of England has been sufficiently tried", was presented to the Cabinet, and at the General Election of 1885 Mrs. Butler issued her "A Woman's Appeal to the Electors".[2] Finally in 1886 the repealing Act[3] passed both Houses of Parliament and received the Royal Assent in April of that year.

Yet during the European War, in the midst of a panic on the spread of venereal disease, the whole question was again reopened. In 1917 Sir George, now Lord Cave, introduced a Bill into the House of Commons embodying the principle of the Contagious Diseases Acts, but it was so strenuously opposed that it had to be withdrawn. The Government then had recourse to the Defence of the Realm Act and under its protection issued the Regulation known as 40D which rendered a woman suffering from venereal disease, under certain conditions, liable to imprisonment for six months, or to pay a heavy

1 Parliamentary Debates, April 20, 1883, Vol. 278, p. 819.
2 *Memoir of Josephine Butler, supra*, p. 183.
3 49 & 50 Vic., c. 10.

fine. The Regulation aroused furious opposition and was withdrawn after six months.[1] "A more scandalous act of executive government," said Mr. Dillon in the House, "in my opinion never was attempted. . . . We have received protests from every woman's association in this country."[2] In 1918 two Bills were introduced into the House of Lords, Lord Sandhurst's Criminal Law Amendment Bill and Lord Beauchamp's Sexual Offences Bill, both of which embodied Regulation 40D, yet with a difference of great importance. Regulation 40D had applied to women only, the clauses in the Bills applied to men and women equally. "Any person who is suffering from venereal disease in a communicable form shall not have sexual intercourse with any other person, or solicit or invite any other person to have sexual intercourse with him or her."[3] Other clauses, however, were directed only against prostitutes, Clause 3 of the Criminal Law Amendment Bill giving power to a Court, where a girl was under eighteen and under certain conditions, to detain her in an institution or home until such time as she attained the age of nineteen. Both Bills were committed to a Joint Select Committee of the two Houses which sat and heard evidence in October and November 1918, but owing to the dissolution of Parliament the question, for the moment, was dropped. In 1920 both Bills were reintroduced and a Committee of investigation was again appointed in July of that year. By those who were contending for an equal moral standard between men and women it was felt that the clauses, though asserting equality in theory, would not do so in practice. "Say what you like," said Mr. John Burns in the House of Commons, "these two Bills . . . imply differential treatment".[4] "My Committee," said Miss Alison Neilans in her evidence in

1 Report on Criminal Law Amendment Bill, 1920, p. 40, Parliamentary Debates, July 24, 1918, Vol. 108, p. 1989.

2 Parliamentary Debates, July 24, 1918, Vol. 108, p. 1945.

3 Criminal Law Amendment Bill, 1918 (H.L.).

4 Parliamentary Debates, 1918, Vol. 108, p. 1915.

1920, "particularly object to the words 'solicit or invite' on the ground that this part of the clause is only likely to be applied to women, and practically compels a woman charged under this section to be medically examined to prove her innocence."[1] And, in speaking against the clause in the Bill of 1920 which proposed to give to the Court the power to detain in an institute or home a girl under eighteen, Miss Neilans said: "Our chief objection . . . is that the clause once again perpetuates in our legislation the double moral standard of morals. It is not considered necessary to hold committees over young men who indulge in promiscuous intercourse; it is not felt necessary to send them to homes of detention for three years because of their morals."[2] The Bill was not proceeded with, and no attempt has been made to revive it. But compulsory 'notification and compulsory treatment' is still favoured by some people in preference to voluntary notification and treatment. In 1930 the treatment of venereal disease was considered by The Traffic in Women and Children Committee at Geneva, and the British delegate "emphasized the importance of gaining the patients' co-operation. From the point of view of the liberty of the subject, he drew attention to the danger of applying the compulsory system to one class of the community only and thus reviving some of the main objections to the system of official regulation".[3]

In other directions, too, attempts have been made, and are still being made, to give the sanction of law to an equal moral standard. In 1883 and again in 1885 Criminal Law Amendment Bills were before Parliament and both, among other things, sought to make solicitation by men an offence against public order. In 1883, in a discussion as to whether it was desirable to delete the words in the Acts of 1839 and 1847, which required that annoyance to inhabitants or passengers

1 Evidence of Miss Neilans for The Association for Moral and Social Hygiene, Report 1920, pp. 112 and 116. 2 *Ibid.*
3 League of Nations Publications. C. 216. M. 104. 1930. IV.

should be proved by the person annoyed, Lord Shaftesbury pointed out that solicitation was practised by men to the great annoyance of women, especially of those women who were returning home after their day's work. He moved to insert 'person' instead of 'common prostitute or night-walker' so as to "render men as well as women liable to punishment for loitering for immoral purposes."[1] The amendment was defeated. In the words of Lord Dalhousie, "it would enable any woman of bad character to bring charges for the purpose of extortion against male passers by. . . ."[2] "Equally unsatisfactory," commented the *Englishwoman's Review*, "is the rejection of every proposal to render men as well as women liable to punishment for loitering for immoral purposes in any thoroughfare.[3] "The clause was again introduced in 1885, but was struck out at the instigation of the Home Secretary and the provisions in the Acts of 1839 and 1847 remained unamended and are unamended to the present day. In 1898, however, the Vagrancy Act to amend the Vagrancy Act of 1824 was put on the Statute Book, and enacted that "every male person who in any public place persistently solicits or importunes for immoral purposes shall be deemed a rogue and a vagabond[4] . . . thus recognizing the principle which but fifteen years earlier had failed to get a hearing. Again the clause in the Metropolitan Police Act[5] which enacts that "every person who in any thoroughfare or public place shall use threatening, abusive or insulting behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned . . . may be arrested by any constable who witnessed the offence and is liable to a fine of 40/-" has been used to charge men as well as women, and in many of the provincial towns local acts

1 Parliamentary Debates, June 25, 1883, Vol. 280, p. 1399.
2 Parliamentary Debates *supra*. p. 1400.
3 *Englishwomen's Review*, 1883, p. 324.
4 61 & 62 Vic., c. 39, s. 1 (i).
5 2 & 3 Vic. (1839), c. 47, s. 54 (13).

and by-laws have been passed under which similar powers are conferred on the police.[1]

At the same time the tendency of recent years has been in the direction of extending the powers to deal severely with solicitation by women. The clause in the Metropolitan Police Act and the clauses in many of the local acts referred to above have been "largely used . . . to prosecute women who were seen soliciting but who were not previously known as 'common prostitutes'"[2] and the clauses referring to prostitutes both in the Act of 1839 and in the Act of 1847 have been so interpreted as to make it unnecessary for the person annoyed to lodge a complaint. The evidence of the police is all that is required to prove the two facts, that the woman is a common prostitute and that annoyance has been caused. "Police evidence," says Dr. Mary Gordon in a Memorandum handed to the Committee in July, 1920, "as to the fact, is accepted by magistrates, and following this the person can be charged for that, 'being a common prostitute' she committed the offence with which she was charged."[3]

Whether or not it is desirable that the State should act as *censor morum*, is open to dispute, and on this question there is considerable divergence of opinion. Some people would give the police power to arrest at their discretion on the ground that wide powers are necessary for the maintenance of public order, while others contend that no conviction ought to be possible unless the person annoyed has made a complaint. It is felt by those who hold this latter view that to give to the police arbitrary powers must lend to grave miscarriages of justice and is not necessary in the interests of street order. A Bill to give effect to the changes which they consider desirable was intro-

1 Report of Committee on Street Offences, 1928. Cmd. 3231. *Cf.* Manchester Police Act, 1844, s. 102; Liverpool Corporation Act, 1921, s. 416.

2 Report of Departmental Committee on Street Offences, 1928. Cmd. 3231.

3 Appendix A to Report on Criminal Law Amendment Bill, 1920.

duced in 1925[1] and a second Bill in 1926, both by Lady Astor, and a Bill was introduced into the House of Lords by Lord Balfour of Burleigh also in 1926. The question was referred to a Departmental Committee which reported in 1928.[2] The Committee recommended that the requirement of proving annoyance should be eliminated but that mere solicitation should not be made an offence. They recommended that existing general and local legislation relating to solicitation should be repealed and put forward the following draft resolutions:—(1) Every person who in any street or public place importunes any person of the opposite sex for immoral purposes shall be guilty of an offence. In this section the term 'importunes' shall be construed as referring to acts of molestation by offensive words or behaviour. (2) Any person who frequents any street or public place for the purpose of prostitution so as to constitute a nuisance shall be guilty of an offence. Provided that no person shall be convicted of an offence under this section except on the evidence of one or more of the persons aggrieved."

It will be noticed that, in addition to the section which applies equally to men and women, the Committee has recommended that prostitution should be specifically dealt with but that no conviction should take place upon police evidence alone. Perhaps public opinion will be ready for complete equality by the time the next Bill is introduced.

Legislation has also taken steps to punish the procurator and the *souteneur*. Public opinion had, to some extent been scandalized by the Paris incidents in 1880, but in 1885, as the result of a series of articles published by W. T. Stead in the *Pall Mall Gazette*, facts hitherto disregarded were forced upon the public attention. The Criminal Law Amendment Bill, which up to that moment had failed to make any progress, was

1 Public Places (Order) Bill 15 & 16 Geo. V.
2 Report of Departmental Committee on Street Offences, 1928. Cmd. 3231.

put on the Statute Book. The Act, which is in force to-day, made it a criminal offence for any person, male or female, to procure any girl or woman to become a common prostitute or to leave this country to become an inmate of a brothel elsewhere, or to procure a girl or woman under 21 of good character to have sexual intercourse with any person. The punishment for this offence is imprisonment for a period not exceeding two years with or without hard labour, to which, in the case of a male person, whipping may be added.[1] Trading in prostitution was made an offence under the Vagrancy Act 1898, and this Act was amended by the Criminal Law Amendment Act 1912.[2] Thus "every male person who knowingly lives wholly or in part on the earnings of prostitution shall be deemed to be a rogue and a vagabond", and "every female who is proved to have, for the purposes of gain, exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person or generally" is guilty of an offence under the Vagrancy Act.

Traffic in women and children was first recognized to be an international question by Josephine Butler. The first international congress was held, as we have seen, in 1877; the first official international congress was held in Paris in 1902. In 1904 the International Agreement for the Suppression of the White Slave Traffic was signed by the delegates of twelve nations, and in 1910 it was supplemented by the International Convention, signed by thirteen nations. When the League of Nations was established, on the application of the International Council of Women and the International Suffrage Alliance, Article 23c was included in the Covenant which entrusted the

1 Criminal Law Amendment Act (1885), 48 & 49 Vic., c. 69, s. 2.

2 Vagrancy Act (1898) 61 & 62 Vic., c. 39, s. 1; Criminal Law Amendment Act (1912) 2 & 3 Geo. V, c. 20, s. 7. Apparently only a woman can form the subject of prostitution, since prostitution has been held to mean the offering for reward by a female of her body. See R. *v.* de Munck (1918) 1 K.B. 635.

League "with the general supervision over the execution of agreements with regard to the traffic in women and children".[1]

(2) *Offences against the Person.* We saw that in 1837 the law did, to a slight extent, differentiate between men and women in respect of sexual offences against the person.[2] Rape was a felony; seduction of a girl was a felony or a misdemeanour, according as to whether she was under ten or under twelve years old; forcible abduction of an heiress was a felony; and abduction of a girl under sixteen against the will of her parents or guardian a misdemeanour. A conspiracy to procure the defilement of a young woman was also punishable. As to man he required no such protection, since he stood in less danger of being seduced by older women, nor, under the double moral standard which prevailed, would such seduction have had any harmful social effects. But because of the double moral standard young and inexperienced women stood in great need of the protection which the law, acting on the principle that a girl over twelve was old enough to understand the nature of immorality and must therefore take the consequences of her action, and ignoring the fact that girls might be seduced by fraudulent representations which did not come within the category of conspiracy, failed to afford her. Such was the situation when in 1843 an Association, the Associate Institution for Improving and Enforcing the Laws for the Protection of Women, was formed, which in 1843 obtained the introduction of a Bill in the House of Lords.[3] The Bill was dropped, but in

1 The fifth Committee of the Assembly and the Traffic in Women and Children Committee concern themselves with this question. See League of Nations Publications, particularly "Report of Fifth Committee to the Assembly." Official No. A. 55. 1932 IV.; Report of the Special Body of Experts (IV. Social, 1927; IV 2), Commission of Inquiry into Traffic in Women and Children in the East (IV. Social, IV. 8).

2 See Ch. I, p. 34 *ante*.

3 Essay by J. E. Davis, 1854. Prize Essay written for the Associate Institution for improving and enforcing the Laws for the Protection of Women.

1849 "An Act to protect women under twenty-one from fraudulent practices for procuring their defilement" was put on the Statute Book.[1] In the movement which led up to the passing of this Act it does not appear that women took any part; it, like the Factory Acts which became law during the same period, had its origin in the humanitarianism of the day which sought to give protection to the weak and oppressed. Yet here too legislation moved warily, each Act taking protection a step further than did the earlier Act. The Offences Against the Person Act of 1861 enacted that an indecent assault on any woman and an attempt to have carnal knowledge of a girl under twelve should be criminal offences, but many of the other sections dealing with sexual offences merely re-enacted the provisions of the earlier Acts.[2] The Act provided that it should be a misdemeanour to procure the defilement of any woman or girl by threats, by fraud, or by administering stupefying drugs, or to abduct a girl under sixteen. It provided that to abduct a woman of fortune for the sake of her fortune and against her will or, if she was under twenty-one, to take her by fraud and against the will of her father or mother for the purpose of procuring her marriage or defilement, should be a felony. It also enacted that it should be a felony to abduct any woman by force and against her will for the same purpose. In 1873 a Bill introduced into the House of Commons to raise the age of consent from twelve to fourteen had to be withdrawn, but two years later an Act which raised the age of consent to thirteen and made the seduction of a child under twelve a felony was put on the Statute Book.[3] In 1880 yet further protection was given to young children by the Act which stated that "it shall be no defence to a charge . . . for indecent assault on a young person under the age of thirteen to prove that he or she consented"; [4] but it was not until 1884 that the whole

[1] 12 & 13 Vic., c. 76.
[2] 24 & 25 Vic., c. 100, ss. 48, 49, 50, 51, 52, 53, 54, 55.
[3] 38 & 39 Vic., c. 94, s. 3. [4] 43 & 44 Vic., c. 45.

question was debated in Parliament when it aroused a great deal of controversy. Some members wished to raise the age of consent to eighteen, some wished to raise it to sixteen, and yet others contended that it was unnecessary to raise it at all. In the country, women's organizations favoured raising the age to eighteen, and in 1884 a petition containing 40,000 signatures was presented by them to the House of Lords.[1] The Act of 1885[2] raised the age below which carnal knowledge should be a felony[3] from twelve to thirteen and enacted that the age of consent should be sixteen, with the proviso that reasonable cause to think the girl was sixteen or over should be a good defence to a prosecution under that section. The Act further declared that it should be a misdemeanour to take away a girl under eighteen out of the possession of, and against the will of, her father or mother with intent "that she should be carnally known". In 1918, as we have already seen, the whole question of sexual offences came up for discussion, and in that year, as again in 1920, a number of Bills were introduced which had as their object the prevention and punishment of various forms of immorality. Many men and women desired to raise the age of consent, both for indecent assault and seduction, to eighteen, many desired to abolish the provision which made reasonable cause to believe a girl of or above the age of sixteen a good excuse under the Act of 1885.[4]

And here, too, we find the equality of the sexes emphasized by women. Women are anxious that the law shall not give to them advantages and protection which it does not give to men; they are also anxious to sweep away all legislation which sanctions a double moral standard and wish therefore to

1 *Englishwoman's Review*, 1884, p. 287.

2 48 & 49 Vic., c. 69, ss. 4, 5, 6, 7. See also Children and Young Persons Act (1933), Geo. V.

3 There is a presumption of law that a male under fourteen cannot be guilty of the felony of carnal knowledge. There is no such presumption in respect of indecent assault. Cf. Archbold's Criminal Pleading. Ed. P.

4 Evidence before the Joint Committee on the Criminal Law Amendment Bill 1920.

emphasize the necessity of protecting not merely the immature girl but also the immature boy. The Bill sponsored by the Bishop of London in 1920 gave expression to this desire. Speaking on this question in the House of Lords the Bishop said: "Clause 4 is put in at the request of the women of this country who are so anxious not to be one-sided in their legislation; they want the boys to be protected as well as the girls; therefore they have asked me to put in the Bill the following clause—'Any woman of or above the age of twenty-one years who unlawfully and carnally knows or attempts to have carnal knowledge of a boy under the age of seventeen years shall be guilty of a misdemeanour, and being convicted thereof, shall be liable for any term not exceeding two years, with or without hard labour."[1] Public opinion was perhaps not yet ripe for a provision of this kind, and those who desired to incorporate it in their Bill recognized that for the moment it might have to be dropped.[2] But it has recently been held that a woman can be convicted of an indecent assault on either a man or a woman under ss. 52 & 62 of the Offences Against the Person Act.[3] The Act which was put on the Statute Book in 1922 did not raise the age of consent, but it enacted that "it shall be no defence to a charge or indictment for an indecent assault on a child or young person under sixteen to prove that he or she consented . . ." and "that reasonable cause to believe that a girl was of or above the age of sixteen shall not be a defence to a charge under section 5 or 6 of the Criminal Law Amendment Act of 1885. . . . Provided that in the case of a man of twenty-three years or under the presence of reasonable cause to believe that the girl was over the age of sixteen shall be a valid defence on the first occasion . . ."[4] and thus took the

1 Parliamentary Debates, March 16, 1920, Vol. 39, p. 461.

2 Evidence of Mr. Allen before Joint Committee on the Criminal Law Amendment Bill, 1920, p. 22.

3 Rex *v.* Hare, L.T. Dec. 2, 1933, p. 430.

4 Criminal Law Amendment Act (1922), 12 & 13 Geo. V, c. 56, ss. 1, 2.

protection afforded to young people a step further. But, reasonable cause to believe that the girl was over the age of sixteen is no defence in a charge of indecent assault under section 2 of the Criminal Law Amendment Act 1880.[1]

The crime of attempting to procure abortion and the crime of attempting to destroy a life of a child capable of being born alive may be committed by a man or by a woman. But a woman is guilty of the crime of attempting to procure her own miscarriage if, being with child, she does any wilful act to bring it about.[2]

The crime of Infanticide can be committed only by a woman. The Infanticide Act, passed in 1922,[3] was the result of a general feeling that a verdict of murder was too severe for a woman who, not having fully recovered from the birth of her child, caused its death. It enacted that, "where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission has not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted tto murder, be guilty of felony, to wit, of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child."

Concealment of birth was in 1837 a crime which could be committed only by a woman. By the Offences Against the Person Act 1861 it was enacted that "if any woman shall be delivered of a child every person who shall endeavour to conceal the birth thereof shall be guilty of a misdemeanour."[4] It can thus now be committed by a man.

With one exception, the sentence of death may be passed on

1 R. *v.* Forde (1923), 2 K.B., 400.

2 Offences Against the Person Act (1861). 24 & 25 Geo. V, c. 100, ss. 58, 59; Infant Life (Preservation) Act (1929), 19 & 20 Geo. V, c. 34.

3 Infanticide Act (1922), 12 & 13 Geo. V, c. 18.

4 24 & 25 Vic., c. 100, s. 60.

a woman under similar circumstances to those in which it would be passed on a man, and the exception is of quite recent date. In 1931 an Act was put on the Statute Book to prohibit the passing of the sentence of death upon expectant mothers.[1] A woman committed of an offence punishable by death who is proved to be pregnant must now be sentenced to penal servitude for life. The question whether she is pregnant "shall before sentence is passed on her, be determined by a jury," and the jury "shall be the trial jury." The old jury of matrons is abolished, and so is a woman's right "to allege in stay of execution that she is guilty with child."

Whipping was made illegal for females in 1820[2] but it is still inflicted on males.[3] With regard to prison conditions a female prisoner sentenced to hard labour is to be kept at labour for not more than ten or less than six hours, exclusive of meals; a male prisoner is to be employed for not more than twenty-eight days in "strict separation on hard bodily or hard manual labour" for the same number of hours per day, and after that time on labour of a less hard description.[4] A young female offender who has been sent to a Borstal Institution may at the expiration of three months be let out on licence, but the licence may not be granted to a young male offender until six months have expired.[5]

(3) *Effects of Matrimony on Criminal Responsibility.* We saw in Chapter I,[6] that a woman under coverture could not be convicted of certain crimes although she had actually committed them. A married woman who committed certain crimes in the presence of her husband was presumed to have committed them under compulsion, though the presumption could

1 1931. 21 & 22 Geo. V, c. 24.
2 1 Geo. IV, c. 57.
3 In the case of robberies with violence; incorrigible rogues; procurers, *see* also Children and Young Persons Act (1933).
4 5 Archbold's *Criminal Pleading.*
6 Prevention of Crimes Act (1908). 8 Ed. VII, c. 49, s. 5.

be rebutted if it were shown that she had acted voluntarily and not under coercion.[1] The doctrine was never held to apply to treason and murder, nor to minor offences such as the keeping of a gaming-house or a house of ill-fame, but to all other felonies and misdemeanours. In 1878 the doctrine was considered by the Criminal Code Commissioners, who recommended that the presumption as to coercion should be abolished,[2] and Sir FitzJames Stephen, writing on the subject in his *Digest of the Criminal Law*, said: "Surely as matters now stand and have stood for a great length of time, married women ought as regards the commission of crimes to be on exactly the same footing as other people."[3] But nothing came of the recommendation, and the matter did not arouse much interest until brought before the public mind by a concrete case. In the Peel case, which was tried in 1922, Mrs. Peel, who had been as guilty of fraud as had her husband, was acquitted on the technical ground that there was no evidence to rebut the presumption that she had acted under the coercion of her husband, though, in the words of the Judge,[4] such a doctrine was "absolutely inappropriate to modern life". "This legal protection of the married woman," as *The Times* pointed out," was a remnant not of chivalry but of serfdom."[5] In April 1922, a Committee "to consider the doctrines of the criminal law with reference to the wife's responsibility for crimes committed by her in the presence of or under the coercion of her husband, and to report what changes, if any, are desirable in the criminal law upon the subject" was appointed. The Committee recommended "to abolish the whole doctrine of coercion by the husband as a defence for the wife, leaving her on the same footing as other people free to establish any defence of that kind of compulsion (i.e. the fear of immediate death

1 Report of Committee on the Responsibility of Wife for Crimes committed under the Coercion of her Husband. 1922. Cmd. 1677.
2 S. 38 of Code.
3 Stephen's *Digest of Criminal Law*, Note II, p. 333. Ed. 1877.
4 *The Times*, March 15, 1922. 5 *Ibid.*

or grievous bodily harm) which affords a defence to any person except in the case of specified crimes."[1] The recommendation, however, of the Committee was not adopted in the Bill brought in in 1923, which enacted that "any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of her husband is hereby abolished".[2] In the House of Lords Lord Parmoor moved an amendment to abolish not merely the presumption but the whole doctrine of coercion, thus placing a married woman on exactly the same footing as any one else[3]; but the amendment was defeated, and the clause as it was in the Bill of 1923 found its way into the Act of 1925.[4] Yet it is difficult to see why this defence should be open to a married woman, or why intimidation by a husband should be on a different footing from intimidation by any one else.

On the question of the inability of husband and wife to form a conspiracy, the Committee did "not recommend any alteration in the existing law", nor did they recommend any change of the law under which a wife is "not liable to be indicted as an accessory after the fact to her husband's felony". Yet, where the wife has committed a felony the husband who harbours or assists her is punishable, and again one is unable to see why there should be this distinction.

We saw that at Common Law neither husband nor wife could steal the property of the other, and this was not altered until the Married Woman's Property Act of 1882[5] put an end to the fiction, as far as property was concerned, of the unity of husband and wife. That Act enacted that husband and wife were

1 Committee on the Responsibility of Wife for Crimes committed under the Coercion of Husband, p. 5.

2 Criminal Justice Bill (1923).

3 Parliamentary Debates, March 8, 1923. Vol. 53, p. 326.

4 Criminal Justice Act (1925), 15 & 16 Geo. V, c. 86, s. 47.

5 45 & 46 Vic., c. 75, ss. 12, 16, now Larceny Act (1916) 6 & 7 Geo. V. c. 50, s. 36.

criminally liable for stealing each other's property if living apart at the time of the offence or if the property was taken with a view to desertion. But neither husband nor wife can be prosecuted for theft of the other's property where there is no intention of bringing cohabitation to an end.

(4) *Competency of Husband or Wife to Give Evidence.* Another disability under which both husbands and wives suffered, caused by the theory of the unity of man and wife, was, as we saw, their inability to give evidence either for or against each other, except in special cases.[1] The Evidence Amendment Act of 1853[2] expressly enacted that nothing in the Act contained was to render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding. The Married Women's Property Act of 1884[3] gave to both husband and wife the right to be called as witness where either was taking criminal proceedings against the other for an offence against his or her property, but it was not until 1898 that the law as it stands to-day came into force. By the Criminal Evidence Act 1898[4] a husband or wife of the defendant became competent to give evidence in criminal cases but only for the defence and only on the application of the party charged.[5] In special cases—for example, in the case of a prosecution under the Vagrancy Act of 1824 or the Children Acts, or the Offences Against the Person Act, or the Criminal Law Amendment Act, or the Married Women's Property Act—the husband or wife of the party charged is a competent witness also for the prosecution and quite irrespectively of the consent of the party charged.[6] But a husband or wife, although a competent witness, is not a compellable one in a prosecution

[1] Ch. I, p. 37 *ante*. [2] 16 & 17 Vic., c. 83, s. 2.
[3] 47 & 48 Vic., c. 14.
[4] 61 & 62 Vic., c. 36, ss. 1, 4. [5] *Ibid*, s. 1 (c).
[6] *Ibid*, s. 4, Schedule 23, as extended by later Acts.

under the first four Acts,[1] nor under certain other Acts;[2] communications between husband and wife during marriage are privileged from disclosure in evidence.[3]

1 R. *v.* Leach, L.R. (1912) A.C. 305. But if competent and compellable at Common Law they are still competent and compellable. R. *v.* Lapworth (1931), 1 K.B. 119.

2 Archbold's *Criminal Pleadings*

3 Criminal Evidence Act (1898) 61 & 62 Vic., c. 36, s. 1 (d).

CHAPTER VII

WOMAN'S PUBLIC RIGHTS AND DUTIES: NATIONAL AND LOCAL GOVERNMENT

We have now to trace the changes which have taken place in woman's position in national and local government, and in doing so we touch on that aspect of the emancipation movement which has aroused the greatest controversy and the strongest feelings. As we have seen, the Reform Act of 1832 first gave statutory sanction to the electoral disabilities of women,[1] yet it was in the social situation which followed that Act that women's different outlook had its birth. "In my young days," wrote a suffragist in 1870, "it was considered rude to talk politics to ladies. . . . But the excitement that prevailed all over the country at the prospect of the Reform Bill of 1832 broke down these distinctions. . . . I caught the infection, and as soon as ever I understood the benefits expected from a £10 franchise I began to wish the female householders should have it too, thinking it only fair play they should."[2] On all sides woman was awakening to the wider call of social service, and the anti-slavery crusade and the Anti-Corn Law agitation both made their appeal to her to use her influence in the cause of humanity and justice. Yet she soon discovered that the call could not be answered; everywhere prejudice, tradition, legislation, held up a prohibitive hand—"so far and no further." She sought to make her contribution to the Anti-Slavery Convention and found the doors closed against her[3];

[1] Ch. I, p. 39.
[2] *Record of Women's Suffrage*, by Helen Blackburn, p. 14.
[3] Blackburn, *op. cit.*

London had no use for delegates from the United States if they were of the feminine sex. In the agitation which centred round the repeal of the Corn Laws women did take an active part. "The women of Manchester", says the Anti-Corn Law Circular of 1841, "have set a noble example to their sisters throughout the country. They have already obtained more than 50,000 signatures to the memorial adopted at the Corn Exchange. The ladies of Bolton, Wigan, and Stockport are engaged in canvassing their respective towns." But we realize with what hesitation and diffidence such participation was effected from the following words. Writing in 1852 in his *History of the Anti-Corn Law League*, Archibald Prentice says: "It was found that mothers, wives, and daughters took a deep interest in the question which so much engrossed the attention of sons, husbands, and brothers. . . . Thousands of female hearts beat indignantly at the thought that food should not be had where it could be had, while millions were in a state bordering upon starvation. . . . On . . . October 29th the Corn Exchange in Manchester was handsomely decorated for a tea party at which more than eight hundred and fifty attended, a considerable portion consisting of ladies. . . . This was the commencement of the co-operation in which the ladies rendered effectual service to a cause endeared to them by the full confidence that it was the cause of humanity and justice. . . . I offer no apology for the course they took, for I never had the least doubt of its perfect consistency with the softer characteristics of female virtue."[1]

There is yet another sense in which the spirit of the time had laid its hand on women. As we have seen in each of the preceding chapters, woman was beginning to regard herself as an end and not merely as the means to a further end, and she chafed at the legislative and customary restrictions which denied her the opportunities she required. The failure of

[1] *History of Anti Corn Law League*, by Archibald Prentice, Vol. I, Ch. XI.

the Married Women's Bill introduced by Sir Erskine Perry to obtain a hearing, the sanctioning of a different moral standard for men and women by the Divorce Act of 1857, forced women to the conclusion that only by proper representation on all governing bodies would their interests be secured. Thus, simultaneously with the demand for educational opportunities, simultaneously with the demand for greater equality and liberty in the marital relationship, came the demand for political emancipation. In 1843 Mrs. Hugo Reid published *A Plea for Women*; in 1847 we hear of the first suffrage leaflet, which was circulated by one Anne Knight, a Quakeress of Chelmsford[1]; in 1848 Disraeli himself referred to the enfranchisement of women in sympathetic terms. "In a country governed by a woman—where you allow women to form part of the other estate of the realm—peeresses in their own right, for example—where you allow women not only to hold land but to be ladies of the manor and hold legal courts—where a woman by law may be a churchwarden and overseer of the poor—I do not see, where she has so much to do with the State and Church, on what reasons, if you come to right, she has not a right to vote."[2] In 1851 Mrs. J. S. Mill published in the *Westminster Review* an essay on the "Enfranchisement of Women", and in 1855 appeared under the name of "Justitia" Mrs. H. D. Pochin's pamphlet *The Right of Women to Exercise the Elective Franchise*. "With what truth or rationality," demands Mrs. Mill, "could the suffrage be termed universal while half the human species remain excluded from it? . . . The Chartist who denies the suffrage to women is a Chartist only because he is not a lord; he is one of those levellers who would level only down to themselves. . . ." To the argument that "pursuits from which women are excluded are unfeminine and that the proper sphere of woman is not politics or publicity but private and domestic life," she replied: "We

[1] Blackburn, *op. cit.*
[2] Quoted by Mrs. Henry Fawcett in *Woman's Suffrage*, People's Books.

deny the right of any portion of the species to decide for another portion . . . what is or what is not their proper sphere. . ."[1]

And Herbert Spencer, though he refused his support when a practical proposal for extending the franchise to women was brought forward, expressed himself in 1851 strongly in favour of the equality of the sexes in every sphere. "Who," he asked in the chapter in *Social Statics* which he devoted entirely to the rights of women, "shall say what her sphere is?"[2] Yet it was not until 1865 that the question of the enfranchisement of women entered the sphere of practical politics, for in that year John Stuart Mill, who in his election address had given a prominent place to women's suffrage, declaring himself wholeheartedly in favour of it, was returned to Westminster.[3] We have had occasion to refer more than once to Mill's views on the emancipation of women, and his advocacy of their right to the franchise invested the movement with an air of reality and prestige which, at that moment, it would otherwise have lacked. Mill in 1865 was at the height of his fame, and no cause to which he lent his name could be dismissed as the aberration of a fool or a fanatic. From the point of view of theory, it is obvious that his philosophic outlook predisposed him to look with favour on any demand for equality and for liberty, and to set little store on arguments drawn from prejudice and tradition; but we may doubt whether theory by its own intrinsic force would have been sufficient to account for the strong practical support which he gave to the movement. Mill's interest in the emancipation of women was first aroused through his friendship with Mrs. Taylor, who in 1851 became his wife, and of whose ability and character he entertained so high an opinion. The cause of woman's suffrage in those days found

1 *Enfranchisement of Women*, by Mrs. Mill, published in *Dissertations and Discussions*, J. S. Mill, Vol. II, p. 417.
2 *Social Statics, by Herbert Spencer*, Chap. VI, published 1851.
3 Blackburn, *op. cit. What I Remember*, by M. G. Fawcett.

many devoted supporters in men, yet it bears out our contention that the initial step had to be taken by women themselves when we realize that it was the wives of such men who were the leaders of the movement. Mrs. Jacob Bright and Mrs. Henry Fawcett, Mrs. M'Laren and Mrs. Russell Gurney, Mme. Bodichon and Mrs. Butler, to mention but a few, were a standing refutation of the traditional belief that women cared nothing for matters outside the domestic sphere and were intellectually incapable of having a reasoned judgment on public affairs. They were also a standing refutation of the theory that the public activities of women must react unfavourably on domestic life and on the character and personality of woman herself.

The entry of Mill into Parliament gave to women the opportunity which they required in order to bring their cause into the arena of practical politics. Those who believed that the enfranchisement of women would lead to an enhancement of life had a twofold duty to perform. They had to convince the legislator that women demanded the electoral franchise as necessary to the development of personality, and that such a development was in the true interests of society and the race. Neither of these objects was easy of attainment. The demand for the suffrage was but of yesterday and was therefore not part of the social inheritance which shaped the thoughts and activities of the younger women of the day. The demand could but be the result of independent thought and experience, and many of the younger women still feared to make such demands lest they should be thought erratic. The women who threw themselves into the work had to be women of "great strength and character". The second assumption which underlay the demand for the suffrage was yet more difficult to prove, since no such theory or principle is amenable to proof until it has been subjected to the test of experience. Past experience is, of course, a guide where the proposed change is merely an ex-

tension of a principle already admitted, but where a new principle is in question a certain amount of faith on the part of the community is essential. In 1865 women could claim but few achievements which could be used as a precedent for further concessions. What are the causes which impel a nation to act on faith at one moment of its history and not at another raises questions of extreme interest. So far as woman's emancipation is concerned one is inclined to assert that although rights were often granted as a result of some external, unforeseeable event, and might not have been granted but for such an event, yet the event by itself would have been barren of result had there not been the social inheritance to invest it with an appropriate meaning. The social inheritance in 1865 was hostile to woman's suffrage, and it was the mission of the suffragists to modify and mould it.

In 1866 the Representation of the People Bill was before the House, and Mill promised to present a petition in favour of granting the franchise to women if a hundred signatures could be secured. Immediately an informal committee was formed, and in less than a fortnight 1,499 signatures were obtained. The petition was presented on the day the House went into Committee.[1] But the Representation of the People Bill did not become law in 1866, and the year which followed its rejection was a year of great activity in the suffrage movement. Committees were formed in Manchester and London, and when the Bill came before the House in 1867 three petitions—the first signed by 1,605 women who would, had they been men, have had the necessary voting qualifications, the other two by 3,559 and 3,000 men and women[2]—were presented by the supporters of the movement in Parliament: Russel Gurney, H. A. Bruce, and John Stuart Mill. On May 20th Mill

[1] Blackburn, *op. cit.*

[2] Blackburn, *op. cit.* *What I Remember,* M. G. Fawcett, p. 65.

moved his amendment, " to leave out the word ' men ' in order to insert the word ' person ' instead thereof ". Thus the question of granting the suffrage to women was for the first time debated in Parliament.[1] The amendment failed, but Mill's lucid and impassioned plea for the general emancipation of women was not without effect. Answering those who asserted that the exercise of the vote would interfere with woman's domestic duties, he said: " I have never understood that those who have votes are worse merchants, or worse lawyers, or worse physicians. . . . I know there is an obscure feeling—a feeling which is ashamed to express itself openly—as if women had no right to care about anything except how they may be the most useful and devoted servants of some men. . . . We talk of political revolutions, but we do not sufficiently attend to the fact that there has taken place around us a silent domestic revolution. . . . It will be said . . . the interests of all women are safe in the hands of their fathers, husbands, and brothers. . . . Sir, this is exactly what is said of all unrepresented classes. . . . What has become of the endowments which the bounty of our ancestors destined for the education, not of one sex but of both indiscriminately? . . ."[2] The Endowed Schools Act passed in 1869, two years later, made, as we shall see, endowments available for girls' schools as well as for boys' schools. Again we see how one disability rested on another, how one concession made possible another. Speaking in favour of Mill's amendment, Henry Fawcett drew attention to the success which had resulted from throwing open examinations to women. " After a severe contest the proposal to try it for three years was carried by a majority of five. Those three years had just expired, and the experiment had been perfectly successful."[3] Arguments against extending the franchise to women betrayed the same attitude towards women and towards life in general which underlay the

[1] Parliamentary Debates, May 20, 1867, Vol. 187, p. 817.
[2] *Ibid.* [3] *Ibid.*

opposition to every demand for wider opportunities and fuller rights. There was, in 1867, no demand for the extension of the suffrage to married women, nor was there any suggestion that the further right not merely to elect but to be elected should be granted.[1] Yet the opposition centred largely round the undesirability of giving to a married woman a power which would allow her to act as an independent human being. The unity of the family must be preserved, and to preserve it woman must be content to remain for ever the means to an end beyond herself. "A married woman," argued one member, "might not 'gad about', and if she did her husband was entitled to lock her up. . . . He believed that a man qualified to possess the franchise would be ennobled by its possession; women, in his humble opinion, would be almost debased or degraded by it. She would be in danger of losing those admirable attributes of her sex—namely, her gentleness, her affection, her domesticity."[2]

Disappointed in Parliament, suffragists next sought to realize their hopes through the Law Courts. Just before the passing of the Reform Act of 1867 a theory, based on the historical researches of Chisholm Anstey, that woman had previously exercised the vote and that no Statute had deprived her of that right, gained currency, and the various suffrage societies determined to act on it.[3] In 1868 the first public meeting in favour of granting the franchise to women was held in Manchester, "the first meeting addressed in this country by women, and the policy which the Women's Suffrage Societies were to pursue was laid down."[4] Chisholm Anstey's argument, taken in con-

1 Parliamentary Debates, May 20th, 1867. But both Mill and Fawcett "would undoubtedly confer the suffrage upon married women". *See* Parliamentary Debates and *Women's Suffrage Journal*, May 1st, 1875.

2 Parliamentary Debates, May 20th, 1867, Vol. 187, p. 833.

3 See *Women's Suffrage Journal*, Aug. 1, 1877, p. 139, and Sept. 1, 1877, p. 156.

4 Blackburn. *Record of Women's Suffrage*, p. 71.

junction with an Act of 1850,[1] known as Lord Brougham's Act, or alternatively as Lord Romilly's Act, and with the Reform Act of 1867[2] were the grounds upon which women relied to justify their inclusion on the register of electors. The Act of 1850 enacted that " in all Acts words importing the masculine gender shall be deemed and taken to include females unless the contrary . . . is expressly provided." The Act of the Act of 1867 substituted the word 'man' for the words 'male person'. Women who would have been entitled to be on the register had they been men were asked to send in their claims. In Manchester the claims of 5,346, and in Pendleton and Broughton the claims of 857, women householders were disallowed by the overseers; in Salford the names of 1,431 women who had been placed on the register by the overseers were disallowed by the revising barristers. These claims were tried in a test case on November 7, 1868,[3] in the Court of Common Pleas before Lord Chief Justice Bovill and Willes, *J.*, Keating, *J.*, and Byles, *J.* It was argued on behalf of the appellants by Sir John (afterwards Lord) Coleridge that " there was originally no distinction between men and women in this matter, and that subsequent legislation has not introduced any such distinction; and secondly, that the Representation of the People Act of 1867 as explained by Lord Brougham's Act confers a right of voting upon women even if they did not possess it before." On the other side it was contended that women were under a legal incapacity to vote, that the word 'man' does not include women in the Act of 1867 for " the word man is used specifically as opposed to infants and women ". This line of argument was accepted. There might be a few cases in which women had voted, Chief Justice Bovill declared; " but these instances are of little weight as opposed to uninterrupted usage to the contrary for several centuries . . . this raises a strong presumption against its having legally existed. . . . 'Man' desig-

[1] 13 & 14 Vic., c. 21. [2] 30 & 31 Vic., c. 102, [3] L.R. 4 C.P. 374 (1868).

nates male sex—male person was used in the Act of 1832, and the Act of 1867 is not to be inconsistent with that Act. If women were to be enfranchised the word 'female' would have been used." Willes, *J.*, in agreeing with the judgment of the Chief Justice, added the following remark: "Admitting," he says, "that fickleness of judgment and inability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex either in point of intellect or worth . . . the exemption was founded on the motive of decorum and was a privilege of the sex (*honestas privilegium*) according to Selden."

Having failed to get a judicial decision in their favour, the supporters of women's suffrage had again to rely on parliamentary reform. In the country the work of educating public opinion proceeded apace, while sympathizers in the House promised every possible help. In 1869 appeared Mill's famous book *The Subjection of Women*, in which the enfranchisement of women was shown to be desirable in the interests not only of woman herself but of society, in the interests both of abstract justice and concrete reform. In 1870 the *Woman's Suffrage Journal*, under the editorship of Miss Becker, was founded, and in the same year the first Bill for the enfranchisement of women was introduced into the House of Commons by Jacob Bright.

By this time, moreover, an Act enlarging the public activities of women had been put on the Statute Book. In 1869 the Municipal Corporations Bill, the logical result of two Acts which had been placed on the Statute Book in 1847 and 1848, was before the House. These two Acts, the Commissioners Clauses Act[1] and the Public Health Act,[2] had conferred certain powers on authorities in districts other than boroughs, known as Improvement Act Districts and Local Government

[1] 10 & 11 Vic., c. 16. [2] 11 & 12 Vic., c. 63.

Districts, thus investing such districts with an incipient municipal government. In each case it was enacted that "words importing the masculine gender shall include females". These districts were, at the time, not sufficiently important to aspire to the rank of municipal boroughs, and their unimportance was reflected in the fact that women were permitted to elect representatives and to be themselves elected as in the case of the minor offices of churchwarden, sexton, and overseer.[1] But by 1869 the situation had changed. Many of the districts were flourishing and important parts of the country and were applying for incorporation as municipal boroughs. The problem then arose as to whether incorporation, which conferred many advantages, should be the instrument for depriving women of a right which they had hitherto owned and exercised. No doubt Mill's advocacy of the parliamentary suffrage had done much to prepare the House for the lesser concession, no doubt women's new ventures into the educational world had had some effect on public opinion, no doubt also women's propaganda had forced men to a slight revision of their outlook. At all events, when Jacob Bright moved as an amendment to the Municipal Corporations Act on June 7: "That in this Act, etc., whenever words occur which import the masculine gender the same shall be held to include females for all purposes connected with and having reference to the election of or power to elect representatives of any municipal corporation", the amendment passed without dissent.[2]

The women's societies had, of course, been very active. The Committee of the National Society for Women's Suffrage in Manchester had undertaken the task of spreading information and promoting petitions; fifteen hundred copies of articles conveying information on the rights which women had anciently possessed and of which they had been deprived by

[1] Ch. I, p. 41.

[2] Parliamentary Debates, June 7th, 1869, 3rd Series, Vol. 196. Appendix.

the Act of 1835 were distributed, and about forty petitions containing between 2,000 and 3,000 signatures were presented.[1] On the passage of the Bill through the House of Commons Miss Becker, the Secretary of the Manchester Committee, wrote to the Marquis of Salisbury putting forward all the arguments in favour of granting the municipal franchise to women. "Should any opposition be offered to the clause in the House of Lords, I would earnestly invoke your support of a measure which is at once liberal in restoring their vote to classes which have been disfranchised and conservative of existing rights."[2]

The Act was hailed with delight in the belief that a beginning had now been made and that the same arguments which justified the granting of the municipal franchise would also justify the granting of the political franchise. "The removal of the disabilities with regard to the Parliamentary vote is the natural sequence of the removal of municipal disabilities . . ." wrote Miss Becker, with an optimism doomed to disappointment. Not by logic alone was electoral enfranchisement to be won. Nor did the Act of 1869, though it enacted that sex should no longer disqualify women from voting in municipal affairs, remove the disqualification of coverture. In 1872 this point was decided in the case of Reg. *v.* Harrald, thus confirming the verdict given in respect of the contractual power of a married woman to which we have already referred that the Legislature, at that moment, did not intend to alter the status of a married woman.[3] In the case in point an action was brought against a town councillor who had been elected by a majority of one, one of the electors being a married woman who lived apart from her husband and who paid rates and occupied her own house, another being a single woman when her name was placed on the burgess roll who had since married. The judges

1 *Englishwoman's Review*, January, 1870.
2 Blackburn, *Record of Women's Suffrage*, p. 92.
3 Reg. *v.* Harrald, L.R. 7 Q.B. (1872), 361.

all agreed that a woman, married at the time her name was put on the roll, had no elective power: "Coverture is a personal disability, and it matters not when it arises so long as it exists at the time of voting. A married woman is not a person in the eye of the law. She is not *sui juris*."[1] On the second point there was less certainty, but the decision went against the woman.

Yet slowly, hesitatingly, tentatively public opinion was committing itself to the principle that the entry of women into public life was beneficial alike to them and to society at large. When the Education Act of 1870 became the law of the land and Education Boards established to administer it, the right to elect and to be elected was granted to women.[2] In November of that year three women were elected, Miss Becker in Manchester, Miss Garrett, M.D., and Miss Davies in London. In 1875 Miss Martha Merrington took her seat, as the first woman to be returned, on the Board of Guardians in South Kensington.[3]

It is no part of our purpose to trace the history of the suffrage movement, for which we must refer the reader elsewhere.[4] We can merely allude to the strenuous activities of all those men and women interested in it and to the many Resolutions and Bills which came before the House of Commons, only a few of which ever passed a second reading. In 1880 hope and energy ran high; the Liberal party had been returned to Parliament, woman's suffrage had been introduced and passed in the House of Keys, and it was thought that the coming Reform Bill which could not be long delayed would give to Englishwomen the coveted prize. Many members were pledged to

1 Reg. *v.* Harrald, L.R. 7 Q.B. p. 361 (1872).
2 Parliamentary Debates, June 16th, 1870, Vol. 102, p. 259.
3 *Englishwoman's Year Book*, 1875.
4 *Woman's Suffrage Journal*; Blackburn, *Record of Women's Suffrage*; M. G. Fawcett; *Woman's Suffrage* (People's Books); *What I Remember*, M. G. Fawcett; *M. G. Fawcett*, Ray Strachey; *The Suffragette Movement*, Sylvia Pankhurst.

support a suffrage Bill, resolutions in favour were carried in 1883 and 1884 in different parts of the country.[1] The Bill for extending to householders in the country the franchise that in 1867 had been given to householders in boroughs was read a second time on April 7, and on May 1 Mr. Woodall gave notice to add a new clause providing that words importing the masculine gender should include women. The clause was defeated on June 12th, Mr. Gladstone two days previously having offered it "the strongest opposition in my power" on the ground that "the cargo which the vessel carries is, in our opinion, a cargo as large as she can safely carry."[2]

In 1885 a new activity was opened out to women when the Primrose League[3] called into existence the Ladies' Grand Council "not to maintain any party or persons, but principles only", and in 1886 the Women's Liberal Federation was inaugurated, the nucleus being the Liberal Associations which since 1881 had sprung up in different towns. At last in 1888 Parliament gave further recognition to woman's claim to have a voice in the management of public affairs when the Local Government Act of that year[4] conferred the county franchise upon her. The municipal franchise, which had been given by the Act of 1882,[5] and the county franchise, the two most important elective rights apart from the parliamentary one had thus been granted by 1888 to single women. Had the law also conferred the right to be elected? This question did not come up for consideration until 1889 when Lady Sandhurst was elected as councillor for Bromley and Bow. She polled 1,896 votes as against 1,686 of her opponent who contested her election on the ground that her sex disqualified the lady from taking her seat. The case was tried before the Lord Chief Justice, Lord Coleridge, who twenty-two years before had sought to

1 Blackburn, *op. cit.*, p. 159.
2 Quoted by Mrs. Fawcett, *op. cit.*
3 Blackburn, *op. cit.*, p. 171; also leaflet, *Why I should join the Primrose League.*
4 51 & 52 Vic., c. 41. 5 45 & 46 Vic., c. 50.

establish woman's legal right to the parliamentary suffrage. It was argued for Lady Sandhurst that the Municipal Corporation Act of 1882 in conjunction with the Act of 1888 had given to women the right not merely to elect but to be elected. Section 2 (3) of the Act of 1882 enacted that "every person shall be qualified to be elected and to be a councillor who is, at the time of the election, qualified to elect to the office of councillor". Lord Coleridge, in giving judgment, contended that, taken by itself this section would certainly have conferred on women who were entitled to elect the right to be elected had not section 63 of the same Act entirely altered the interpretation of the whole Act. "For all purposes", the section ran, "connected with and having reference to the right to vote at municipal elections words in this Act importing the masculine gender include women." It was held that if this section meant anything at all it must be held to limit the inclusion of the feminine in the masculine gender to purposes connected with the right to vote at municipal elections and, therefore, since the same conditions applied to the Act of 1888, at county elections. If the intention had been to extend it to all purposes, including the right to be elected, that intention would have been expressly stated, or section 63 would not have been inserted.[1] In 1891 the decision of 1889 was reaffirmed when the election of Miss Cobden, who had been returned as Councillor for Brixton at the same time as Lady Sandhurst, was declared illegal.[2]

While these disputes, disappointments and concessions kept the question of the political enfranchisement of women ever before the electorate and the Legislature, the movement itself made little progress. In 1886 and 1892 Suffrage Bills, doomed to an untimely death, were again introduced into the House of Commons; in 1889, with the appearance in *The Nineteenth*

[1] L.R. 23 Q.B.D. p. 79 (7889).
[2] De Souza *v.* Cobden (1891), 1 Q.B. p. 687.

Century[1] of a letter signed by a number of influential women, the Anti-Suffragist movement made its *début* into the world. Among the signatories we notice the name of Mrs. Lynn Lynton, the woman novelist opponent to the so-called 'modern' girl who, a year later, when the rights of a husband over the person and liberty of his wife[2] were tested, raised her voice on the side of those who upheld the old relationship. "All these changes of recent years," ran the letter, "together with the great improvements in women's education which has accompanied them we cordially welcome. But we believe that the emancipating process has now reached the limits fixed by the physical constitution of women and by the fundamental differences which must always exist between their main occupations and those of men. The care of the sick and the insane, the treatment of the poor; the education of children: in all these matters and others besides they have made good their claim to larger and more extended powers. . . . But when it comes to questions of foreign or colonial policy or of grave constitutional changes, then we maintain that the necessary and normal experience of women—speaking generally and in the mass—does not and can never provide them with such materials for sound judgment as are open to men. . . . It is proposed to admit married women with the requisite property qualification. This proposal . . . introduces changes in family life and in the English conception of the household of enormous importance which have never been adequately considered."[3] Anti-suffragists were in favour of women taking an active part in local government, they were in favour of women taking an active part in politics, since they encouraged them to assist their men folk and sanctioned the work of women's political bodies, they were in favour of making their voices

1 "Appeal against the Suffrage," *Nineteenth Century*, June, 1889, Vol. XXV, p. 781.

2 *The Girl of the Period*, by Mrs. Lynn Lynton. See "Life" by Layard.

3 Letter in *Nineteenth Century*, as above.

heard on matters which affected them[1]—yet, as a matter of historical fact those very arguments which they employed against granting the political suffrage had, as we have seen, done service each time there had been a question of further extending the emancipation of women. Each time timidity and hesitation had vanished as experience put an end to controversy and it was found possible to reconcile conflicting claims in an harmonious whole.

In 1894 came the Local Government Act[2] which instituted the urban and rural district councils as we know them to-day, and which enacted, in respect to parish councils, district councils, urban councils, and boards of guardians that "no person shall be disqualified by sex or marriage for being elected or being a councillor . . . or being an elector". In 1899, by the London Government[3] Act, vestries in London were raised to the rank of metropolitan boroughs and the question of the eligibility of women to serve as aldermen or councillors again aroused discussion. The debates in both Houses of Parliament on this subject make interesting reading. Over and over again, indeed in every speech, the outstanding feature was the anomalous position of women in public life. On the one hand it was possible for supporters of further emancipation to point to the concessions that had already been made as proof that the proposed change was merely the extension of a principle already admitted; on the other hand it was possible for those who opposed extending the franchise to women to argue that if this concession be granted there was no logical reason for refusing more comprehensive ones. "This is merely the thin end of the wedge," said Mr. Labouchere.[4] "And I fail to see," Lord Dunraven contended, "how you can find any sound grounds on which to prevent them taking part in the legislation

[1] See for example Letter by Anti-Suffragists on National Health Insurance Act. *The Times*, July 24th 1911, p. 6.

[2] 56 & 57 Vic., c. 73. [3] 62 & 63 Vic., c. 14.

[4] Parliamentary Debates, 1899. Vol. 72, p. 474.

of the country and sitting in Parliament."[1] To admit the eligibility of women meant the introduction of a new principle which must logically be extended. "As Poor Law Guardians, members of educational bodies and factory inspectors women have done admirable work and the country can very ill afford to lose their services," Lord Dunraven admitted, but "this is an absolutely new principle." Yet, with perfect truth, a member of the House of Commons pointed out that exactly the same arguments had been used against allowing women to serve on those very bodies where now their activities were recognized to be so beneficial. Those who opposed rendering women eligible to serve on the borough councils were deficient in the historical sense since they failed to see the continuity between past and present. But most of those who supported this particular concession had hardly any greater political acumen, for they failed to see the continuity between present and future. Sir H. Fowler, after speaking in favour of the clause permitting women to sit as councillors, declared that he would "oppose any attempt either to convert women into mayors, or magistrates, or archbishops or heads of police or generals in the Army or members of Parliament;"[2] Lord Salisbury, Prime Minister at the time, asserted "if there are persons who really believe that because you allow women to sit as members of these new bodies you are hastening the admission of them to the parliamentary suffrage I can only say that that is a system of argument that I am wholly unable to understand. The two things have nothing whatever to do with each other."[3] The opposition was successful, and it thus came about that the Act of 1899 allowed women in London the right to elect but added to the clause "the council of each borough shall consist of a mayor, alderman and councillors"

1 Parliamentary Debates, 1899, Vol. 73, p. 537.
2 Parliamentary Debates, 1899, Vol. 72, p. 474.
3 Parliamentary Debates, 1899, Vol. 73, p. 546.

the words, " provided that no woman shall be eligible for any such office ".

In 1897 a Suffrage Bill, introduced by Mr. Faithfull Begg, was again before the House, and the various women's societies,[1] the Women's Liberal Unionist Association, the Women's Liberal Federation, the Women's Co-operative Guild passed resolutions in favour of it ; meetings were held, petitions sent in, but the Bill was prevented by hostile members from getting beyond its second reading. Yet, in spite of disappointment there was no discouragement, and immediately after the failure of the Bill the National Union of Women's Suffrage Societies issued a statement of policy declaring that it " would place the question in such a position that no Government, of whatever party, shall be able to touch questions relating to representation without, at the same time, removing the electoral disabilities of women ".

In 1899 suffrage activities were deeply affected by the outbreak of the South African War. Actual propaganda work ceased and the energies of public minded women were concentrated on work connected with the struggle. Just as in the fifties the Crimean War had given to Florence Nightingale the opportunity which she needed for the introduction of improvements in the nursing profession, and to women in general the opportunity to press their claims for emancipation, so the South African War made it possible for them to prove their value in other directions.[2] Yet the franchise was not granted. In 1904 and 1905 resolutions were brought forward in Parliament ; but, in the words of an historian of the day " woman suffrage could not be said as yet to have much interested the country and the electors at large."[3]

The attention of the country was at length arrested by the

[1] Blackburn. *Record of Women's Suffrage*, p. 214.

[2] *Englishwoman's Review*, January, 1900, p. 14; April, p. 77; Oct., p. 226. *What I Remember*, M. G. Fawcett.

[3] *History of Modern Times*, Gretton, Vol. II, p. 275.

activities of the Women's Social and Political Union, and the supporters of woman's suffrage were faced with a problem the answer to which depends not so much on ascertainable facts but on the individual's reading of history and on his views of the ethical relationship between the group and the State. Has a group the right to seek to enforce its will by physical violence? The Women's Social and Political Union, formed in 1903,[1] answered this question in the affirmative and militant tactics were adopted for the first time in 1905 when a disturbance was caused by the interruptions of suffragettes at a meeting addressed by Sir Edward (afterwards Lord) Grey. Demonstrations were organized all over the country, the Government candidate at every by-election was opposed, and militant suffragettes not only themselves suffered violence but used violence in their determination to force the Government to concede their demand. It was a time of great difficulty for the non-militant societies, who deprecated the use of force and feared lest the attention which the movement was then focusing upon itself would be turned to hostile rather than to favourable purpose.[2]

While the question of the parliamentary franchise was thus agitating the country, further concessions were made in the field of local government. In 1907 an "Act to amend the law relating to the capacity of women to be elected and act as members of County and Borough Councils"[3] at last conceded the right which since 1899 women had claimed. We can gauge the advance in public opinion when we find the question occupying a place in the King's speech: "You will be invited to consider proposals for enabling women to serve on Local Bodies." We need not consider the arguments used for and against: we are familiar with them. There was but one differ-

1 *The Suffragette*; *The Suffragette Movement*, Sylvia Pankhurst.
2 *Woman's Suffrage*; *What I Remember*, M. G. Fawcett; and *The Suffragette Movement*.
3 7 Ed. VII, c. 33.

ence. In 1899 the opponents to the measure could still command a majority; in 1907 they could not. Section 1 of that Act reads as follows: "A woman shall not be disqualified by sex or marriage for being elected a councillor or alderman of the council of any county or borough (including a metropolitan borough)" and then the proviso, "Provided that a woman, if elected as chairman of a county council or mayor of a borough shall not by virtue of holding or having held that office be a justice of the peace." Another twelve years had to pass before that disqualification, like all those which preceded it, was swept away. Further, the concession was granted not merely to single women but to married women also. In one sense, indeed, that concession was nominal rather than real, for citizens who were not entitled to elect were not entitled to be elected, and married women, with the exception of those resident in London boroughs[1] still suffered under the disqualifications which the decision in Reg. *v.* Harrald[2] had laid upon them. Yet the clause in the Act of 1907 marked the acceptance of a changed social outlook, the passing of the belief "that any measure of this kind is a bad one because it removes women from the sphere of home . . . and plunges her into the turmoil of public life", and of the ideal of woman as "a sort of combination of the maid-of-all-work and the ministering angel".[3] In its place stood the recognition of the fact that the rights and duties of woman, like those of man, extended into wider activities and that such interests on her part in no way interfered with the discharge of her necessary duties as wife and mother. In 1908 two events of interest to the feminist cause took place, the election of Dr. Garnett Anderson as mayor at Aldeburgh—and of Miss Dove as mayor of High Wycombe.[4]

In 1910 a Bill, known as the Conciliation Bill, was introduced into the House of Commons. It made no progress and

1 62 & 63 Vic., c. 14. 2 Reg. *v.* Harrald, L.R. 7 Q.B.D., p. 361.
3 Parliamentary Debates, June 12th, 1907, Vol. 175, p. 1347.
4 See *Englishwoman's Year Book*.

a second Bill was introduced in 1911. Hopes of success were great. When, therefore, in November 1911, the Government announced their intention of bringing in their Electoral and Registration Reform Bill and made no mention of the enfranchisement of women, feeling ran high.[1] The Government consented to accept an amendment but, on the amendment being moved, the Speaker ruled that the character of the Bill had thereby been altered to such an extent that it must be withdrawn and a new Bill introduced. The session was advanced, and the Bill was dropped. In 1914 Mr. Henderson brought in a Private Member's Bill " to extend the parliamentary franchise to men and women and to amend the registration and electoral system ".

Such was the position in the autumn of 1914, at the outbreak of the European War, which was to be the direct cause of the conceding of that claim for which for more than fifty years women had struggled. War stimulates the national consciousness; it brings to everybody a recognition of the meaning and value of citizenship and the importance of electoral rights. In the years between 1914 and 1917 women's work covered the whole ground of social activities; they came forward to step into the breach made by the enlistment of men and, to a large extent, themselves enlisted, not it is true as combatants, but as workers on the administrative side, as workers in munition factories and above all as nurses—services at home and abroad which were everywhere acknowledged to be as necessary to the successful prosecution of the war as fighting itself. Women had opportunities thrust upon them and they rose to the occasion. Men felt that they had vindicated their claim to full citizenship, and that both gratitude and justice demanded that the franchise should now be granted. Women valued the franchise more than ever, since more than ever did their inter-

[1] *What I Remember*, M. G. Fawcett; *The Suffragette Movement*, Sylvia Pankhurst.

ests demand that they should be represented in the legislative assembly. The question of the nationality of married women, the question of women remaining in the higher branches of the Civil Service, questions affecting the welfare of children, to mention but a few of the many problems to which we have already referred, could, it was felt, only be adequately dealt with in the interests of women if their views were represented in Parliament. Men felt this equally with women. "It is doubly necessary now," said Colonel Sanders, "not only out of gratitude to them for what they have done in the course of the war but, I think, in mere justice. One thing one notices all over the country is that women are now taking the place of men. When the men come back the question must arise as to whether the women are to stay or the men to come in. How these questions are to be settled I do not for a moment pretend to say; but I do say that it is only just and fair that the women should have a voice in settling it."[1]

It is possible to argue that the enfranchisement of women would not have become a reality had it not been for the event of war and the psychology born of it. On the other hand the position in 1914 was such as to make responsible people realize that the day for granting the suffrage to women could not be long delayed. Again, the war introduced new factors; it convinced many who had hitherto been opposed to the justice and wisdom of women's claims, and the step was no longer felt by them to be a leap in the dark. But without the long years of preparation and propaganda men would assuredly not have chosen this way of showing their appreciation of the work that had been done. How different was the point of view of 1917 from that of some fifty years earlier the debates in the House well illustrate. At that time woman had no claim to be considered as a legal entity apart from her husband. In 1917, in proposing an amendment to the effect that the wife

[1] Parliamentary Debates (1917), Vol. 93, p. 2148.

of a man disqualified on the ground of being a conscientious objector should not herself be disqualified a member drew the following picture: " I can imagine a case of this sort. A woman may go to her husband and say, 'John, you must not be a coward, you must fight the Germans.' He may reply: 'My dear, I won't; I prefer to remain at home.' Under these circumstances that woman is to be deprived of her vote. If, on the other hand, she says to her husband: 'John, your conscience ought to make you restrain yourself from bloodshed; let the Germans come and never mind what happens'; and he replies: 'My dear, I am not such a coward, I shall fight,' then the woman is to have the right to vote. I submit that that is an absolutely indefensible position." The amendment was carried.[1]

Yet the franchise was not granted to women on exactly the same terms as to men. It was thought that, as there were more women than men woman's vote would become too powerful, since the fear that women as a sex would vote against men as a sex still haunted the imagination. The franchise, therefore, was granted subject to qualifications: a woman voter must be thirty, she must be entitled to be registered as a Local Government elector or be the wife of a man entitled to be so registered. The Representation of the People Act conferring these electoral rights on women received the Royal Assent in February, 1918.[2]

Ten years later the final step was taken. Referring in the House of Lords to the fear that had been expressed in 1918 that men and women might be divided into opposite camps, Lord Hailsham said: " I think the experience of the last ten years has shown that this is not what really happens, and that women, just as much as men, are divided into different schools of political thought and send their recruits to each of the great

[1] Parliamentary Debates, 1917, Vol. 100, p. 759.

[2] 7 & 8 Geo. V, c. 64.

political parties."[1] By 114 votes to 35 the Bill which granted complete equality was passed.[2]

The right to sit in Parliament as a member of the House of Commons was conceded in the November of 1918.[3] By that Act "a woman shall not be disqualified by sex or marriage for being elected to or sitting or voting as a member of the Commons House of Parliament". This new concession was opposed as it naturally would be. "No one," argued Sir Frederick Banbury, "knows what the result of this great change will be. . . . Until we have ascertained what is the result of extending the franchise to women I submit that the true policy will be to wait and see." But that point of view, so often accepted, no longer commended itself to the Legislature. "How long are we to wait?" asked Lord Robert (now Lord) Cecil. "He does not seem to think of the time that has elapsed since the experiment of allowing women to be elected on local governing bodies and how that has turned out. . . ."[4]

In 1919 came the Act[5] which allowed women "to exercise any public function", to be appointed to or hold "any civil[6] or judicial office or post", to assume or carry on "any civil profession or vocation" and declared that she was not to be "exempted by sex or marriage from the liability to serve as a juror". The right and duty to serve as a magistrate and as a juror were thus conceded to women, though her liability to serve as juror was considerably modified by the proviso: "Any judge, chairman of quarter sessions or other person before whom a case is or may be heard may, in his discretion, on an application made by or on behalf of the parties (including in criminal cases the prosecutor and the accused) or any of

1 Parliamentary Debates, 1928, H.L. Vol. 71, p. 160.
2 Representation of the People (Equal Franchise) Act (1928), 18 & 19
3 Parliament (Qualification of Power) Act, 1918. 8 & 9 Geo. V, c. 47.
4 Parliamentary Debates, 1918, Vol. 110, p. 825. 5 9 & 10 Geo. V, c. 71.
6 See Ch. VIII, p. 228 *post*, for the proviso as to women's admission to the Civil Service.

them or at his own instance, make an order that the jury shall be composed of men only or of women only as the case may require, or may on application made by a woman to be exempted from service on a jury in respect of any case by reason of the nature of the evidence to be given or of the view to be heard, grant such exemption". From the beginning many people objected to this proviso. "It is certainly the considered opinion of large numbers of people of experience," writes Mrs. Keynes, J.P., " . . . that women have a definite responsibility and duty in reference to jury service, and their presence on the jury is of special importance when cases are tried in which children or young girls are concerned."[1] A Bill to repeal the proviso was introduced into the House of Commons in June 1933.[2] The Bill also sought to increase the number of women liable to serve by enacting that the husband or wife of a qualified person should be deemed to be qualified and provided that a member of the same sex should replace any member who was removed on challenge.[3]

A number of Acts of Parliament which have established statutory committees with co-opted or appointed members have enacted that such committees shall include women. When the Naional Health Insurance Bill was before Parliament in 1911 women's organizations asked that a proportion of the members of the Committees should be women.[4] The Act did provide for the inclusion of women members and other statutes have similar provisions.[5] One may hope that the day is not far distant when provisions of this sort will be rendered unnecessary

1 *Jury Service and the need for more Women Jurors*, published by the National Council of Women.

2 Parliamentary Debates, June 20th, 1933, Vol. 279, p. 647.

3 As to the grounds on which a member of the jury may be challenged *see* Kenny, *Criminal Law*, p. 475, and *Times* Newspaper, February 10th, 1921.

4 See *Times* Newspaper, July 24th, 1911, p. 6; October 13th, 1911, p. 3; October 31st, 1911, p. 13.

5 1 & 2 Geo. V, c. 55, s. 59 (2) (9). Also Maternity and Child Welfare Act (1918), 8 & 9 Geo. V, c. 29, s. 2 (2); Education Act (1921) 11 & 12 Geo. V, c. 51. First Schedule, 205.

by the certainty that women will be appointed to committees on which the woman's point of view is needed and that the best person, irrespective of sex, will be appointed to those committees in which no sex interests have to be considered.

The right of a peeress to speak and vote in the House of Lords has not yet been recognized, was indeed denied in 1922 when Viscountess Rhondda sought to enforce it. As so often before, the argument was that the right had not been specifically declared and could not be granted by implication; again it was asserted that where a public right was in question it was insufficient to show that the law nowhere forbade it; it must be shown that it positively conceded it. The peerage had been conferred upon Viscount Rhondda with special remainder in default of male issue to his daughter and the heirs male of her body. But the grant contained a clause which conferred upon Viscount Rhondda and the heirs male of Viscountess Rhondda the right to a seat, place and voice in the House of Lords and made no mention of her. Lady Rhondda based her claim to receive a writ of summons to Parliament on the two Acts to which reference has just been made, the Act which gave to women the right to sit in the House of Commons and the Act which removed the disqualifications of sex and on those grounds her claim had been upheld by the Committee for Privileges which sat to consider it. On the motion of the Lord Chancellor (Lord Birkenhead) however, the report was referred back to the Committee which, by a majority of 22 to 4, among the minority being Lord Haldane and Lord Wrenbury, gave judgment against the claimant. Both these Lords upheld the decision which the first Committee had given, contending that in passing the Sex Disqualification (Removal) Act, Parliament had undoubtedly intended to get rid of all disqualifications imposed on grounds of sex.[1] The earlier

[1] Committee for Privileges. Viscountess Rhondda's Claim (1922), 2 A.C., 339.

decision, however, was reversed and Lady Rhondda's claim rejected. Since that date attempts have been made to remove the disability. In 1930 Lord Astor's motion welcoming a measure which admitted women to the House of Lords on the same terms as men was defeated by six votes,[1] and it is no rash prophecy to say that the exclusion of women from the House of Lords, or whatever Second Chamber takes its place, cannot exist much longer. In the words of *The Times*, written in 1923: "If women generally are recognized as being capable, by the exercise of the franchise or by their election to the House of Commons, of exerting influences and performing duties of service to the State there is no logical reason why they should be excluded from the deliberations of the House of Lords."[2]

1 Parliamentary Debates, 1929–1930, Vol. 78, p. 498.
2 *The Times*, March, 1923.

CHAPTER VIII

WOMAN'S RIGHT TO EDUCATION AND WORK
1837 TO 1933

EDUCATION AND THE PROFESSIONS

The right to education is so closely allied with the right of entry to the professions, and the fight for the one so much a part of the fight for the other, that it is desirable to consider them together. Education, however much it be desired for its own sake, is largely sought as a preparation for some sort of active work through which the individual may both express the creative power which is in him and also secure for himself financial independence. Hence it was natural that the democratic spirit of the second half of the nineteenth century should concern itself with education, all the more so because the Individualists held that only by means of education and enlightened self-interest would the enfranchisement which followed the Reform Act of 1832 be effective against the "sinister interests" of the few. When, therefore, as a result of another aspect of the democratic spirit—its sweeping condemnation of privilege and tradition—the uses to which ancient endowments were being put came up in Parliament for discussion and criticism, it was felt that the sums which modern conditions had created could be diverted to no better purpose than to the increasing of educational endowments. The immediate consequence of this was the appointment in 1864 of a Commission to inquire into existing conditions in education, and to advise on the best way of apportioning the money which the Exchequer was about to receive.

By the middle of the nineteenth century the *Zeitgeist* had laid its hold on women as well as on men; they, too, were laying claim to a good education and a good training as the necessary foundation, along with enfranchisement, on which everything else would be built. Of the franchise agitation we have already spoken, but all these demands for fuller opportunities were so interwoven that one cannot help but mention the others when speaking of one. Necessity forced women into the labour market, the spirit of the time forced them into social and political activities. New visions of personal happiness and social service opened out before them—and everywhere they found their activities barred, not merely by prejudice and tradition, but also by their own unpreparedness. "Why are girls so little thought of?" says Frances Mary Buss in her early girlhood.[1] "I want girls educated to match their brothers." And Miss Clough in her diary for 1849[2] has the following remark: "I don't much fancy men often understand women; they don't know how restless and weary they get." "Why," wrote Florence Nightingale, "have women passion, intellect, moral activity—these three—and a place in society where no one of the three can be exercised? . . . This system dooms some minds to incurable infancy, others to silent misery."[3] In 1854 Florence Nightingale went out to the Crimea and made for herself a place in society where all three could be exercised. Her work aroused unbounded admiration and confidence in her ability, and although she was, to her immediate contemporaries, a brilliant exception, yet she had shown what a properly trained[4] woman could achieve.

The ability to profit by education was one of the first tests to which women were put: the fact that each opportunity was greedily seized, that each effort was crowned with success,

1 *Life of Mary Buss*, by Miss Ridley.
2 *Memoir of Ann J. Clough*, by B. A. Clough, p. 75.
3 From "Cassandra," quoted in *The Common Cause*, by Ray Strachey.
4 *The Life of Florence Nightingale*, by I. B. O'Malley.

made it possible for every concession to be no more than a stepping-stone to yet greater opportunities. "We have always held that the only method of progression in women's case, as in all others, is by showing what they can do—by urging their claims in the shape of achievement."[1] These words appeared in the *Englishwoman's Journal* in 1858, voicing the feeling of those who were engaged in active work for the emancipation of women.

We cannot here do more than touch on the many activities of the men and women interested in the education of women. At a very early stage in the movement it received the sympathy and support of men of high standing in the educational world. J. S. Mill was, of course, a staunch supporter from the outset,[2] and Sidgwick and Maurice, and Green, to mention but a few, gave all the help they could. "You bring up your girls" wrote Ruskin, "as if they were meant for sideboard ornaments and then complain of their frivolity. Give them the same advantages as you give their brothers. . . . And give them, lastly, not only noble teachings but noble teachers."[3] "We ought," wrote Henry Sidgwick in 1862, "to give women certain rights which they may fairly claim but which we at present withhold from them. . . . I think simple justice would make us . . . throw open to them such professions as they can be qualified for."[4] We hear first of the formation of the Governesses' Benevolent Institute, founded in 1843 to help women who were earning their living by teaching. In 1848 Queen's College for Women was opened, where governesses, and not only governesses but all women who wished to profit by the opportunity, had for the first time the advantage of really

1 *Englishwoman's Journal*, July, 1858, p. 340.

2 See Mill's Letters edited by Eliot, Vol. I, p. 208 *et seq*. Tennyson's *Princess* was published in 1847.

3 Ruskin, *Sesame and Lilies*. Lectures delivered 1864.

4 *Henry Sidgwick, A Memoir*, by A.S. and E.M.S., p. 73.

good teaching.[1] Here Mary Buss and Dorothea Beale, Ann Proctor and Sophia Jex Blake, to mention but a few, received their first training. The opening of the College was a tentative beginning; it was followed six months later by the opening of Bedford College under Miss Bostock, in 1850 by the opening of the North London Collegiate School under Miss Buss, and in 1853 by the foundation of Cheltenham College, to which Miss Beale transferred her zeal and devotion in 1858.[2]

In other directions the same forces were at work. In 1856 Jessie Meriton White applied to the London University for permission to enter as a medical student, only to be told that the Senate had not the power to grant her request. The demand was renewed in 1862 by Elizabeth Garrett, and the refusal on the same grounds led to the formation of a London Committee, with Miss Davies as secretary, which sought to gain admission for women to University examinations.[3] In 1863 Cambridge gave permission for an informal examination to be held. The experiment was successful, though, at the time, it was not known if girls "were capable of the necessary mental effort", and they were, in 1865, formally admitted to sit for the examinations. Miss Buss's opinion was that "until the Local Cambridge Examinations were organized, there was no sort of recognition on the part of men that the feminine mind could under any circumstances rank with the masculine."[4]

In 1864 the Commission to which we have already referred, known as the Schools Inquiry Commission, was appointed, and Miss Davies and Miss Bostock immediately seized the opportunity. They drew up a petition, which was widely circulated and received many signatures, asking that the education of girls might be included in the survey of the Commission. The

1 The opening address by Maurice is published in *The First College for Women*, ed. Mrs. Alec Tweedie.

2 *Life of Dorothea Beale*, by E. Raikes.

3 *Women in University*, by Emily Davies; *Emily Davies and Girton College*, by Barbara Stephen, Ch. VI.

4 *Life of Mary Buss, op cit.*

request was granted, and in 1865 and 1866 many women who for the last ten years had been engaged on educational work gave evidence before the Commission. The report, published in 1868, threw a flood of light upon the deplorable condition of women's education and opened the eyes of Parliament and of public opinion to the necessity for better teaching. "As to one particular branch of Educational Endowments, namely, that for the advancement of the Secondary and Superior Education of Girls and Women, it may be anticipated that future generations will look back to the period immediately following upon the Schools Inquiry Commission and the consequent passing of the Endowed Schools Acts as marking an epoch in the creation and application of endowments for that branch of Education similar to that which is marked, for the Education of Boys and Men, by the Reformation." [1]

In 1869 the Endowed Schools Bill was before Parliament and again women's associations were active. The North of England Council for Promoting Higher Education, formed in 1867, of which Miss Clough was secretary, and to whose efforts the organization of University lectures, which later developed into the University Extension lectures, was due, drew up a petition to Parliament asking that endowments should be provided for girls' schools as well as for boys' schools. The question was debated, and one member made an eloquent appeal on behalf of women. "The present state of the case is this—the whole of the educational endowments of the country, with the exception of those of the primary schools, are now monopolized by boys . . . it pays to educate boys, but most parents think the Consols a better investment than the education of their daughters. . . . I may refer . . . to the report of the Commissioners . . . it [education] is very bad, very dear and . . . it is almost a consolation to add—there is very little of

[1] Quoted in Report of the Consultative Committee on Differentiation of the Curriculum for Boys and Girls Respectively in Secondary Schools, 1922, p. 31, n.

it. . . ."[1] The result of the agitation was that the Act of 1869[2] enabled endowments to be allocated to girls' schools, and the North London Collegiate School was one of the first to receive the benefit of 1875.[3]

Soon after the formation of the North of England Council differences[4] of opinion arose among the promoters of higher education for women on a question which has not yet been decisively settled and cannot hope to be decisively settled till our knowledge of sex psychology has been considerably extended. Should the education and training of women be identical with the education and training of men; did equality connote similarity, or could there be equality based on differences? It was felt by many, and particularly by the members of the North of England Council, that it was not wise to assimilate the education of girls entirely to the education of boys, nor to subject them to exactly the same examination tests. In consequence of this outlook special examinations and special lectures for girls over eighteen were instituted at Cambridge in 1869 under the patronage of Professor Sidgwick[5] and Newnham College was founded in 1871. On the other hand, the College opened at Hitchin in 1869, which afterwards became Girton College, and of which Miss Davies was the first head, prepared students "to pass University examinations in Honours, under the same conditions as those imposed on men."[6] Miss Davies and Miss Buss,[7] amongst others, asserted that a sceptical public opinion would be convinced of the ability of women to profit by the throwing open of every opportunity only if they proved themselves capable of competing on equal

1 Parliamentary Debates, June 14, 1869, Vol. 196, p. 1744.
2 32 & 33 Vic., c. 56.
3 *Life of Mary Buss, op cit.*
4 *Emily Davies and Girton College*, by Barbara Stephen, Ch. XII.
5 *Henry Sidgwick, A Memoir*, by A.S. and E.M.S.; *A Short History of Newnham College*, by Alice Gardner.
6 *Emily Davies and Girton College*, by Barbara Stephen, p. 277.
7 *Life of Mary Buss*, also *Memoir of A. J. Clough*, and *Life of Sophia Jex Blake*, by M. Todd.

terms. Their point of view cannot be better expressed than by quoting the words of Mrs. Pochin, written in 1870: "It is to give free play to the purely feminine elements that we advocate the present change; and though we propose tentatively to adopt what have hitherto been masculine forms and methods, it is not because men have adopted them but because men have found them to answer. . . . It is quite possible they may not fully answer for women."[1] Looking back on the controversy, one cannot help but feel that it was essential to the emancipation of women to prove that they were capable of the same intellectual work as men. To prove anything less at that time would have been an admission of intellectual inequality. Today the situation is different, and in the words of the Consultative Committee which reported in 1922 on the Differentiation of Curricula between the Sexes in Secondary Schools: "We may now be entering on a third stage in which we can afford to recognize that equality does not demand identity."[2] Yet the Committee found that "our inquiry has not imbued us with any conviction that there are clear and ascertained differences between the sexes on which an educational policy may readily be based",[3] and several of the witnesses explained the differences which they noted between boys and girls as "due not to any divergence of educable capacity, but to divergence of interest . . . . and how far this divergence in interest, which was not wholly due to innate capacity, but was also due to environment, was biological in origin, and how far it was accounted for by the fact that boys and girls were from their earliest days subjected to different traditions", has not yet been answered.[4]

In 1870 girls were admitted to the Oxford Local Examination, and in the same year the agitation for admission to uni-

1 "Mr. Mill's 'Subjection of Women' from a Woman's Point of View," by Justitia.

2 Report on Differentiation between the Sexes in Secondary Schools, 1922, Introduction, p. xiii.

3 *Op. cit.*, Introduction, p. xiii.

4 *Op. cit.*, p. 92.

versities on equal terms with men received a new impetus. It has already been noted that in 1856 and again in 1862 a woman had presented herself to the London University as a candidate for the medical diploma, her application having been refused on the ground that the charter did not provide for the admission of women. In 1869 Miss Jex Blake received a similar reply.[1] At that time, since the passing of the Medical Act of 1858, medical practitioners were required to have their name on the register of the Medical Council, and for this they had to produce "the document conferring or evidencing the qualification or each of the qualifications in respect whereof he seeks to be so registered. . . ."[2] There is no reason to suppose that the Act deliberately contemplated closing the medical profession to women, but since none of the examining bodies were willing to give to women the necessary certificates, it did in practice have this effect. Two women at the time Miss Jex Blake made her application were practising medicine in England: one, Dr. Blackwell, had taken her degree in Switzerland prior to the passing of the Act of 1858, and therefore came under the provision which allowed her to be registered; the other, Dr. Garrett, who had unsuccessfully applied for admission to London University, had succeeded in obtaining a certificate from the Apothecaries Hall, one of the licensing bodies. On realizing the effect of thus granting a licence, the governing body of that association decided that it should not happen again and refused to allow women to attend their lectures or have private tuition.[3]

Miss Jex Blake, who was soon joined by others wishing to qualify in the same way, made her way to Edinburgh, where, after much consideration on the part of the University, she was at last allowed to matriculate. To the difficulties which these women encountered and overcame it is possible only to

1 *Life of Sophia Jex Blake,* by M. Todd, Part II, Ch. II.
2 21 & 22 Vic., c. 90.
3 *Life of Elizabeth Blackwell. Life of Sophia Jex Blake, supra,* Ch. III.

allude. By their energy and determination they continued to attend classes in spite of the active hostility of many of the men students, and when the opposition of members of the Senate made it impossible for them to attend certain lectures, the kindness of some of the lecturers enabled them to have private instruction. When, however, the time for examination came, the women discovered that they were not to be allowed to sit. Feeling ran high, not in Edinburgh alone, but throughout the country. One professor, in the course of the dispute, asserted that "the Queen had intimated her disapproval and would have her disapproval made known" [1]; old arguments as to the unsuitability of women doctors, on the unsexing of women, and so forth, carried the day. Miss Jex Blake immediately brought an action against the University, and in July, 1872 judgment was given in her favour by Lord Gifford. "They are", he said, "entitled to all the rights and privileges of lawful students in the said University. . . . I find that the pursuers, on completing the prescribed studies and on compliance with all the existing regulations of the University preliminary to degrees, are entitled to proceed to examination for degrees. . . ." [2] The University thereupon appealed against this decision, and the judgment was reversed on the ground that the University's act in admitting women in the first instance was *ultra vires* and illegal. Having failed in the Courts, as they had already failed when their claim to the franchise was tested, as they were to fail years afterwards when their claim to be admitted as a law student was tested, women, with the help of those men whose help could always be relied upon, turned their attention to Parliament. Petitions, one signed by 471 graduates of London University, one by more than 16,000 women, were presented to Parliament. In 1873 Sir David Wedderburn

[1] For the general views of Queen Victoria, see "Lytton Strachey's Essay on Early Victorians," p. 299. "The Queen is most anxious to enlist everyone who can speak or write to join in checking this mad, wicked folly of 'Woman's Rights'. . . . Lady —— ought to get a good thrashing."

[2] *Life of Sophia Jex Blake*, by M. Todd, Part II, Ch. XIV.

introduced a motion to bring in a Bill "to grant to the Scottish Universities the powers they were supposed not to possess to educate women in medicine, and to grant them the ordinary medical degree."[1] Nothing came of this, and the Medical Council, approached by the women themselves, now put forward a scheme of its own. Again the old compromise meets us, the suggestion that women should undergo a different examination and have a different certificate, and again women rejected the proposal, wanting not differential treatment but a certificate which would enable them to follow their profession on equal terms with men. In 1875 the Medical Act of that year empowered the College of Surgeons to admit women to the necessary examinations[2] and Russell Gurney brought in his Bill, which became law in 1876. This Act was merely an enabling, not a compulsory one: "The powers of every body entitled under the Medical Act to grant qualifications for registration shall extend to the granting of any qualification for registration granted by such body to all persons without distinction of sex: Provided always that nothing herein contained shall render compulsory the exercise of such powers, and that no person who but for this Act would not have been entitled to be registered, shall, by reason of such registration, be entitled to take any part in the government, management or proceedings of the universities or corporations mentioned in the said Medical Act."[3] It was felt that the situation did not require a compulsory Act, which could be introduced later if it proved necessary. But it did not prove necessary. The history of women's education since the foundation of the Governesses' Benevolent Institution twenty years earlier has been the history of opportunities seized and justified. The London School of Medicine for Women was opened in 1874, but their theoretical train-

1 *Ibid*, Ch. XVII.
2 The Medical Act (Royal College of Surgeons of England) 1875, 38 & 39 Vic., c. 43.
3 The Medical Act, 1876, 39 & 40 Vic., c. 41.

ing availed them nothing unless they could get practical experience, and unless one of the members of the Examining Board would grant them a licence. This was done in 1877, a year after the passing of the Enabling Act, when the Royal Free Hospital opened its doors to women and the Irish College of Physicians undertook to examine them and thus to grant them the document which would enable their names to be duly registered under the Act of 1858.[1] In 1874 the Owens College of Manchester formed an experimental class for women at which 70 students attended and the classes were continued during the session 1875–6. In 1877 the Manchester and Salford College for women was founded by subscription. The Court of the College had originally been asked by the Manchester Association for Promoting the Higher Education of Women, which was formed about 1870, to make more accommodation for women available in the College. In making the counter-suggestion that an independent women's college should be established, the Court declared that it was "not prepared to sanction the principle of mixed education, believing this would be at once opposed to both the educational interests of students of either sex and out of harmony with the sentiments and usages of society," but that it was willing to "sanction the giving of substantial assistance in the instruction and examination of women." In 1880, when the Victoria University was founded, degrees and full membership were opened to women. But attendance at a College of the University was necessary to obtain them, and in 1883 Owens College took over the Women's College, though for some time afterwards separate classes were still held.[2] In 1878, the new Charter granted to the University of London made the privileges of the University accessible to students of both sexes. In the following year Somerville and Lady Margaret Hall were opened at Oxford. In 1877 an attempt was made to regularize

[1] Parliamentary Debates, 1877, Vol. 234, p. 296.
[2] *Owens College*, T. Thompson, and *The Owens College*, P. J. Hartog.

the admission of women to examinations at Cambridge so that such admission should no longer depend on the goodwill of individual examiners. Mr. Courtney brought in an amendment to the Universities of Oxford and Cambridge Bill to enable the University "to examine female students concurrently with male students". The amendment was lost, but in 1881 the privilege of taking the Tripos examinations on the same conditions as those required from members of the University was granted. "What we gain," wrote Miss Davies, "is that what we have been doing all along by favour, will now be secured as a right."[1] In 1884 Oxford opened some of its Honours Schools, and extended the number between 1888 and 1894. In 1920 women were admitted to the full membership of Oxford University,[2] and became eligible for all degrees except those in Divinity, and they are now admitted to University teaching posts. In 1920 an attempt was made to secure full membership of Cambridge University to women, but without success. In 1921 Cambridge granted titles of degrees to duly qualified women which came into operation in 1923, and in 1926 women became eligible for University teaching offices, and in that capacity are members of Faculties and eligible for Boards of Faculties.[3] They have not yet, however, been accorded membership of the University on the same terms as men.

While the fight for entrance to the medical profession and to the Universities was thus engrossing the attention of some women, others were seeking to extend their activities in different directions. In 1873 an attempt was made to attend the lectures of the Council of Legal Education but it was unsuccessful.[4] In the same year Mrs. Nassau Senior was appointed the first woman Inspector of District Schools and Workhouses; in 1878 women declared themselves in favour of

1 *Emily Davies and Girton College*, Barbara Stephen, p. 326.
2 Universities' Year Book, 1933. 3 *Girton College*, Barbara Stephen.
4 *Englishwoman's Review*, 1873, April.

appointing women inspectors under the new Factory Act, and in 1879 an amendment to that effect, which was not carried, was proposed by Mrs. Paterson, the secretary of the Women's Protective and Provident League, at the meeting of the Trades Union Congress.[1] About 1870 female clerks were appointed in the Post Office, and Henry Fawcett, who became Postmaster-General in 1880, made changes in the department to extend the employment of women.[2] In 1886 the question of female factory inspectors was raised in Parliament, when Lord Thurlow refused to consider their appointment on the ground that "the chief inspector of factories in his report pointed out that the arduous duties of factory and workshop inspection . . . should be discharged by a man."[3] Women factory inspectors were first appointed in 1893.[4] In 1905 Miss Christabel Pankhurst applied for permission to qualify as a barrister,[5] and the refusal to grant it determined her and many others to spare no effort until the franchise had been won and men deprived of their age-long power to regulate the lives of women. In 1913 four women asked to be admitted to the examinations of the Law Society, and, on being refused, determined to test their claim in the Law Courts. The case was tried in 1913 and again, as in 1868, it was held that, since the right demanded had nowhere been conceded, the custom of centuries must be accepted as the law of the land. The legal profession remained closed to women until 1919, when the Sex Disqualification (Removal) Act of that year enacted that neither sex nor marriage should disqualify a woman from carrying on any civil profession.[6]

It was not until 1908 that a body of women civil servants put forward a claim to be allowed to enter the Civil Service on the same terms as men. In that year the Association of Post

1 *Women's Union Journal*, March 8, 1878, and September, 1879.
2 *Life of Henry Fawcett*, by Sir Leslie Stephen, Ch. IV & IX.
3 *Englishwoman's Review*, 1886, p. 133.
4 Hutchins, *History of Factory Legislation*, p. 249.
5 Sylvia Pankhurst, *The Suffragette Movement*. 6 9 & 10 Geo. V, c. 71.

Office Women Clerks discussed the questions of equal pay and equal opportunity at their annual meeting, and in 1910 Lord Aberconway (then Sir Charles McLaren, M.P.) introduced into the House of Commons the Civil Service (Women) Bill, which proposed to give women equal pay with men and equal entry by competitive examinations.[1] The Bill was again introduced in 1910 and in 1913, but without success, and women continued to be "recruited by special examinations open to women only, and it was the practice to employ women clerks in self-contained sections staffed wholly by women."[2]

During the years which followed the outbreak of war many opportunities which had hitherto been denied were thrown open to women, who carried on the work which men had been forced to leave,[3] and in 1919 legislation was at last passed which gave women the right to enter the professions and the administrative class of the Civil Service.[4] "A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession, or vocation, or for admission to any incorporated society (which is incorporated by Royal Charter or otherwise)". But the following proviso was added: "Providing that notwithstanding anything in this section, His Majesty may, by Order in Council, authorize regulations to be made providing for and prescribing the mode of admission of women to the Civil Service of His Majesty, and the conditions in which women admitted to the Service may be appointed to or continue to hold posts therein, and giving power to reserve to men any branch of or posts in the Civil Service in any of His Majesty's possessions".

1 Statement of Case presented by Federation of Women Civil Service. Appendices to Report of Royal Commission, 1931.

2 Report of Royal Commission on Civil Service, 1931 (Cmd. 3909), Sec. XII.

3 Report of War Cabinet on Women in Industry, Ch. III. (Cmd. 135).

4 The Sex Disqualification (Removal) Act, 9 & 10 Geo. V, c. 71.

Acting under these powers, an Order in Council was made in July 1920, and regulations under it in August 1921. The Civil Service Commissioners issued the regulations reserving to men all posts in the Diplomatic Service and in the Consular Service, all posts in the Government Services of the Colonies and Protectorates, and in the Civil Services in India to which appointments are made in the United Kingdom, other than posts for which women may be specially recruited, and, with the exception of the post of Chief Clerk in the respective offices of H.M. Trade Commissioners, all posts in the Commercial Diplomatic Service and the Trade Commissioner Service.[1] In August 1921, the position of women in the Civil Service was debated in Parliament and resolutions were accepted by the Government which, though they did not concede all that supporters of equality desired, did register a step forward in that direction. The first resolution declared "That this House approves of the temporary regulations for competitions governing the appointment of women to situations in the new reorganization classes in the home Civil Service. Provided that, after a provisional period of three years, women shall be admitted to the Civil Service of His Majesty within the United Kingdom under the same regulations, present and future, as provide for and prescribe the mode of admission of men. Provided that the allocation by the Civil Service Commissioners of such candidates as qualify at the examinations shall be made with due regard to the requirements of the situation filled."[2] A second resolution further declared "That women shall be appointed to and continue to hold posts in the Civil Service within the United Kingdom under the same regulations, present or future, as govern the classification and, in so far as regards status and authority, other conditions of service of men."[3] Speaking in favour of conceding to women the equality they asked for, Lord Oxford

[1] S.R.O. No. 1977, 22nd July, 1920; Regulation, 23rd Aug. 1921.
[2] Parliamentary Debates, Aug. 5th, 1921, Vol. 145, p. 1890.
[3] *Ibid.*

(then Mr. Asquith) reminded the House that: "Nearly thirty years ago I introduced the appointment of women as inspectors of factories for the first time. . . . It was suggested that the women would get their petticoats in the machines, and also it was suggested that it would be most unseemly that they should go about at night alone in the workshops. . . . All must admit . . . that it has had most beneficial results, particularly in regard to women and girls in our factories and workshops. . . . I give this by way of illustration to show how efficient women, when they are put to it, can discharge functions in the service of the State which up to a short time ago were jealously reserved for our sex."[1] The examinations for all classes are now open to women on the same terms as to men, but the regulations referred to above are still in force, and in practice women are still limited to the lower grades in many Departments.[2] Equality of pay has also not been granted, and when the Royal Commission on the Civil Service was appointed in 1929 women's organizations hoped that considerable changes would be recommended. The Commissioners did advocate "a fair field and no favours", but their practical suggestions fell far short of what had been expected. They recommended that, with the exceptions of the Defence Departments, there should be no reserved posts, but they qualified this by recommending that women should remain for the time being ineligible for appointment as officers of the Customs and Excise Department and for appointments in the Consular and Diplomatic Service. Another recommendation, if followed—the extension of the policy of "aggregation", the system in which women are employed on the same duties and work side by side with men, as against the policy of "segregation", the system in which women are employed in separate branches and have separate

[1] *Ibid,* p. 1905.

[2] See Appendix XII to Minutes of Evidence, Report of Royal Commission on the Civil Service. Also *Higher Appointments Open to Women in the Civil Service,* published for Council of Women Civil Servants (Higher Grades).

avenues of advancement—would be a real step towards equality. The various recommendations of the Commission have been considered by a Joint Committee representing the official and the staff sides of the Civil Service which reported in March 1934, and recommended: (1) All posts in the Civil Service should be open to members of both sexes equally, except where adequate and publicly announced reasons exist to the contrary.

(2) Where both men and women are employed, segregation should be dropped as a general underlying principle, and "the aggregation of work and of posts" should replace it.

(3) As for the reservation of posts to men or women, each Department should review the situation and within three years a joint central body should review the whole position.

A committee has also been appointed by the Secretary for Foreign Affairs to review the question of the admission of women to the Diplomatic and Consular Services.

Women were first employed to perform certain police duties in the early years of the War, and in 1916 the Police, Factories, etc. (Miscellaneous Provisions) Act[1] of that year recognized such services by enacting that, for purposes of section 24 of the Local Government Act 1888, "the expression 'pay of the police' shall be deemed to include the pay of any woman who may be employed by a police authority to perform any of the duties of the police and are required to devote the whole of their time to such employment". In 1919, by the Sex Disqualification (Removal) Act, the right to serve as a fully qualified member of a police force was granted to women, and in the Police Pensions Act of 1922[2] the term "policewoman" is used: "This Act, in its application to members of a police force who are women (hereinafter referred to as police women) shall have effect as from the date of their appointment as members of the police force". Many counties and boroughs,

[1] 6 & 7 Geo. V, c. 31, s. 4.

[2] 11 & 12 Geo. V, c. 31, s. 28.

however, never appointed any police women, and in 1923 a Bill[1] was introduced into the House of Commons by Miss Ellen Wilkinson which sought to make it compulsory for municipal boroughs to appoint women police by amending section 181 (1) of the Municipal Corporations Act 1882.[2] This section reads: "The Watch Committee shall from time to time appoint a sufficient number of fit men to be borough constables", and the amendment proposed to insert the words "and a sufficient number of police women" before the words "to be borough constables." The Bill was not proceeded with. The desirability of employing women police has been stressed by a number of committees[3] and by a Royal Commission[4] which, in its report issued in 1929 declared: "We are in general agreement with the policy hitherto adopted by the Home Secretary of leaving to local discretion whether or not to employ women police . . . but we trust that the Home Secretary will take steps to ensure that the attention of Chief Constables and Police Authorities is drawn to the marked success with which women police have been employed in various parts of the country, and to the good results which, we are convinced, would follow from an increase in their present numbers". The Police (Women) Regulations now in force, which draw attention to the Duties which may be Assigned to Police Women, were made by the Secretary of State in October 1931.[5] In 1933 there were 84 attested police women and 20 not attested in the five counties and thirty-three

1 Parliamentary Debates, Dec. 8th, 1923, Vol. 189, p. 263.

2 45 & 46 Vic. (1882), c. 50, s. 191 (1).

3 Report of the Committee on the Employment of Women on Police Duties. (Cmd. 877 of 1920); Report of the Departmental Committee on the Employment of Police Women. (Cmd. 2224 of 1924); Departmental Committee on Sexual offences against Young Persons. (Cmd. 2561 1926); Report of the Committee on Street Offences (Cmd. 3231 of 1928).

4 Report of the Royal Commission on Police Powers and Procedure (Cmd. 3297 of 1929).

5 S.R.O. 1931 No. 878, Police, England and Wales.

boroughs which appoint them, and 48 attested police women in the Metropolis and the City of London.[1]

The claim of women to be admitted to the priesthood under the same conditions as men is, of course, not the concern of Parliament. "We desire," says the Memorandum presented to the Lambeth Conference in 1930 on behalf of women, "to see the acceptance of spiritual values and the removal of artificial barriers to the operation of the spirit. We are convinced that the restrictions placed upon women in the Church have a far-reaching effect, and indeed we go so far as to affirm that the subordination of women in the Church hampers the work of the most spiritually-minded men in the ministry to-day. . . . We are convinced that the spiritual experience of motherhood—experience deeper and more vital than a mere physical function or a passing physical disability—can be one so enriching both to the woman herself and through her to those to whom she ministers, and to the whole Church, as far as to outweigh any temporary disadvantage."[2] The Report of the Lambeth Conference, issued in August 1930, was a great disappointment to those people who had expected an advance on the Report of 1920 in that it refused to recognize woman's vocation to the ministry. "A majority of the sub-committee believe that there are theological principles which constitute an insuperable obstacle to the admission of women to the Priesthood."[3] A Commission to consider the whole question has been formed but no report has, as yet, been issued. In the Methodist Church the question of the Ministry of Women has been under discussion for some years. In 1933 the Conference adopted a report which asked for the removal of the sex bar against women entering the ranks of the ministry, the amendment that a scheme should be

[1] Report of His Majesty's Inspector of Constabulary for the year ending 29th September 1933.
[2] Published by the Society for the Ministry of Women.
[3] Lambeth Report, p. 180.

formulated for the constitution of a woman's ministry which would clearly indicate its character as a distinct ministry, being lost.[1] In the Presbyterian Church of England the question is also under consideration. In the Unitarian, Baptist, and Congregational Churches women are already accepted as ministers.[2]

INDUSTRY

Women entered the field of industry many years before the professions were thrown open to them. Although many of the better paid and more highly skilled posts are still, for reasons which will be discussed later, closed to them, yet woman's position in industry claimed the attention of Parliament at a time when her other demands had hardly made themselves heard. The securing of the first reforms was due, not to the efforts of women but to the efforts of men.[3] The Mines and Collieries Act of 1842 and the Factory Acts of 1844 to 1850 are most definitely the fruits of the humanitarianism which ever since the beginning of the century had been sweeping over the country.[4] The public conscience was first aroused, so far as the conditions of women's employment were concerned, in the spring of 1842, when the Report of the Children's Employment Commission on Mines and Collieries appeared, depicting "how from an early age they [women] were employed in dragging trucks of coal to which they were harnessed by a chain and girdle, going on all fours, in conditions of dirt, heat and indecency, which are scarcely printable."[5] The report made a deep impression on the general conscience, and the Act of 1842[6] excluded all women from employment below ground in mines. Here we have the first attempt of the

1 Newspapers, July 15th, 1933.

2 *The Coming Ministry*, published by the Society for the Ministry of Women, June, 1933 and March, 1933. Also for list of Women Ministers in Charge of Churches.

3 B. Drake, *Women in Trade Unions*, p. 9. 4 See Chap. I, p. 2.

5 Hutchins: *The History of Factory Legislation*, p. 82.

6 An Act to prohibit the Employment of Women and Girls in Mines and Collieries (1842), 5 & 6 Vic., c. 99.

legislature to regulate the conditions of labour of an adult person in the interest of that person, and the precedent thus set was almost immediately followed by the Factory Act of 1844.

In 1841 a report issued by the delegates of the Short Time Committees had already demanded restrictions on the labour of women.[1] These Short Time Committees had been called into existence by the joint efforts of operatives who desired statutory interference with their hours of labour, and sympathetic outsiders, men like Shaftesbury, Sadler and Southey, whose humanitarian feelings had been deeply outraged by the long hours of labour and the generally unsatisfactory conditions under which the operatives lived and worked. The Committee sought to establish a uniform Ten Hours' day, and in this they failed. But they were successful in securing restrictions on the work of women, and thus introduced into our legislation the principle that protection was more necessary to one sex than to the other. The men demanded "the gradual withdrawal of all females from the factories", on the ground that "home, its care and its employments is woman's true sphere", and Mr. Gladstone had expressed his sympathy with the requests of the deputation which waited on him: (1) to fix a higher age for the commencement of what they called 'female infant' labour in factories, (2) to limit the number of women in proportion to the number of men in one factory, and (3) to prohibit the employment of married women in factories during the lifetime of their husbands."[2] "Women's place is in the home" is a cry which, as we have seen, has accompanied every effort of woman, not merely to carve out a career for herself, but to cultivate her intelligence or make herself a more efficient citizen. Over and over again man has denied to woman the right of entry into the professions, into the civil service, into the skilled trades, and his reasons for so doing have been complex. His vested interests, his belief in her inferiority,

[1] Hutchins, *op. cit.*

[2] *op cit.*, p. 65.

his many and deep-rooted traditions as to her functions in society, his chivalry have all played their part. But here, it would appear,[1] the men were not troubled by any theory as to what women's rights and duties, what her function in society ought to be. They appear to have used the humanitarian tendency of the age, which could be aroused so much more easily on behalf of women and children than on behalf of themselves, to secure for themselves also better conditions. It was their belief that restrictions placed on the work of women would soon have to be extended to the work of men; that the restriction most easily achievable should be secured first since the logic of events would make the other inevitable. The men who agitated for the Act of 1844 preferred to approach the Legislature on behalf of women rather than on their own behalf, but they hoped thereby to improve their own conditions of labour. Had the hopes of the men of 1841 been fulfilled, had legislation affecting men been introduced shortly after the Acts of 1844, 1847 and 1850, the supporters of woman's rights would not, thirty years later, have found it necessary to protest, as we shall see they did, against further protection on the ground that it acted unfairly on woman's employment, depriving her of her right to dispose of her own labour and treating her as though she were a child unable to look after herself. In 1844 that cry was not heard; there was no opposition on the part of women fearful lest the movement towards the emancipation of women should be checked and stultified by well-meaning but erroneous protection. The emancipation of women had indeed hardly begun. The opposition to factory legislation in its early stages came from different quarters. It was, for the most part, based on the belief that industry could not stand such interference, that it was unfair to single out a particular industry, and that in any case, conditions were no worse, rather better in the textile trade than

[1] Hutchins, *op. cit.*

in many others which were to be left untouched.[1] Here and there a convinced individualist[2] would argue against any interference with the freedom of contract, whether of man or woman, believing that interference would lower wages, and the Radicals, on the whole, were, of course, hostile to such legislation. Yet Whigs, like Palmerston, Macaulay and John Russel, found themselves on this question in sympathy with the Tory philanthropists to whose efforts early factory legislation owes its existence.[3]

Factory legislation introduced the Collectivist principle into English legislation the principle that the State is not merely justified but morally bound to interfere between individual and individual in order that the rights of the weaker may be enforced. "The State," said Lord Shaftesbury (then Lord Ashley), "has an interest and a right to watch over and provide for the moral and physical well-being of her people."[4] And the Legislature accepted the theory that women required such protection and that men did not. These Acts, whatever the intention of some of those who supported them, gave concrete expression to the theory that women in industry required a protection not given to men. People outside Parliament might hope and believe that such protection was merely preliminary to extending it to men, but that was for the future to decide. In the meantime the legislator had given the sanction of law to differential treatment. He believed that woman was less able to fend for herself, less able to unite with her fellow-workers for her own benefit than man was, and at the same time more liable to suffer from long hours and bad conditions. Her physical weakness and her duties as wife and mother made necessary her protection; her inferior bargaining power justified the

1 Parliamentary Debates, April 23rd, 1844, Vol. 74, p. 613.
2 *Ibid.*
3 Macaulay's Speech on Ten Hours' Bill.
4 Parliamentary Debates, March, 1844. Vol. 73, p. 10, 76.

interference which many, at that date, would have hesitated to apply to the work of man.

We may now inquire what protection the Act of 1844[1] gave to women. It extended to her the provisions of the Act of 1833, which had applied to young persons only and so limited her working day to 12 hours; it required that her meals should not be taken in any room in which work was being carried on, that all women employed should have their meals simultaneously, that a woman should not clean any part of a machine while such machine was in motion, and that the twelve-hours' working day must begin from the time that she started work in the morning. This made night work impossible.

The Act of 1844 had one result, so far as women's work and rights were concerned, entirely unforeseen by those most instrumental in putting it on the Statue Book. It and the Acts which succeeded it reacted on public opinion and prepared the way for yet other changes in spheres remote from industry. They recognized the fact that times had changed, that women, whether one liked it or deprecated it, were actually being employed in large numbers in work outside the home for which they were being paid. Thus they paved the way for the Married Women's Property Acts which were to secure to women possession of their property and their earnings. How slowly legislation moved is seen by the fact that the first Married Woman's Property Act was not passed until 1870. But it is interesting to notice the close connexion between one Act and another; by such different routes as the Divorce Act and the Factory Acts do we arrive at the Married Woman's Property Acts of 1879 and 1884.

In 1847 and 1850 two Acts[2] were put on the Statute Book

[1] An Act to amend the Laws relating to Labour in Factories (1844), 7 & 8 Vic., c. 15, ss. 32–37.

[2] An Act to amend the Hours of Labour of Young Persons and Females in Factories (1847), 10 & 11 Vic., c. 29; An Act to amend the Acts relating to Labour in Factories (1850), 13 & 14 Vic., c. 54.

which reduced the hours of women's work from twelve to ten and a half hours; henceforward she had to be employed either between 6 a.m. and 6 p.m., or 7 a.m. and 7 p.m., with one hour and a half off for meals. In 1853 the same provisions were made to apply to children, and in this way a uniform day was secured to all protected persons. The hours of men were still unrestricted, though, in practice, the limitation of the hours during which women and children might be employed reacted on and benefited the men. Gradually one by one other industries were included in the jurisdiction of factory legislation. The first Act had been passed to meet a definite evil, which could be easily ascertained and legislated for, but, as experience proved the value of regulation, and other industries were seen to betray the same defects, the scope of the Act was considerably extended. In 1845[1] factory legislation was made applicable to print works, in 1860 and 1863 to bleaching and dyeing works, in 1861 to lace works, while the Acts of 1863 and 1864 carried the same principles out of the textile trade to bakehouses, to the manufacture of earthenware, lucifer matches, percussion caps and cartridge making, paper staining and fustian cutting.[2] Finally, the Act of 1867 brought many new industries under control.[3] Under this Act a number of modifications considered to be necessary in the interests of particular industries were permitted, but, generally speaking, the provisions to which we have referred were extended to the new industries now included.

So far then legislation had still held to the principle introduced by the Act of 1844, and secured to women a protection which it had not secured to men. In 1873 a Bill was introduced into Parliament which sought to carry this principle still

[1] 8 & 9 Vic., c. 29.

[2] 23 & 24 Vic., c. 78; 26 & 27 Vic., c. 38; 25 & 26 Vic., c. 117; 26 & 27 Vic., c. 40; 27 & 28 Vic., c. 48.

[3] 30 & 31 Vic., c. 103.

further, its object being to obtain for women engaged in the textile trades a nine-hours' day. Gradually, step by step factory legislation had been building up a labour code which would secure to women better conditions of life. But by 1873 new views were making themselves heard; it was beginning to be doubted whether factory legislation was really in the best interests of women. The opposition came now from women, from the women who were fighting, in every sphere, the battle of women's emancipation, and from the men who were helping them.[1] In the journals devoted to the interests of women, in Parliament, by means of petitions, deputations, meetings and pamphlets, their point of view was emphasized. They asserted that, since the disabilities of woman rested on the belief in her general inferiority of man, on the belief that her capabilities and her function made it impossible for her to compete with him on equal terms, she must prove that she could compete, and to do that she must have not only a "fair field" but also "no favour". The same arguments have already met us in the sphere of education. Hence the men and women who were fighting for emancipation from fetters and prohibitions, viewed with alarm the introduction of new fetters and prohibitions which limited woman's freedom to show what her powers were. Writing in 1874 in the *Englishwoman's Review*, Mrs. Goodall declared that she would like to see a nine-hours' work day everywhere, but thought that woman would revolt "against such legislation which would be to treat them as helpless children unfit to be left alone and think for themselves. . . ."[2] And Mrs. Paterson, writing in the *Women's Union Journal*, the organ of the Women's Protective and Provident League, formed in 1874, of which she was hon. secretary, said: "She

[1] See *Englishwoman's Review* for 1872 and *Woman's Suffrage Journal*, 1872; *Englishwoman's Review*, Oct., 1873; April, 1874; *Women's Union Journal*, Sept., 1876; Parliamentary Debates, May 6th, 1874, Vol. 208, p. 1742 and following.

[2] *Englishwoman's Review*, April, 1874.

was strongly in favour of legal regulation of children's work, and also of sanitary inspection of work-places, but she thought the time had come when no fresh legislation should be sought for in the work of women. . . ." [1] In Parliament the chief spokesman of this point of view was Henry Fawcett, who in 1874 moved to exclude women altogether from the operation of the Factory Acts on the grounds that they were able to take care of themselves, and that such restrictions would tend to throw women out of work. "No one could doubt that it placed impediments in the way of employing women; it rendered their employment less advantageous than it would otherwise be, and by rendering it less advantageous . . . there was nothing more certain than that they diminished the value of that labour, and by diminishing its value decreased its remuneration." [2] On the whole these objections have had but little effect on the course of legislation. The Act of 1874 was passed, but in 1878, those who opposed further restrictions succeeded in obtaining concessions in respect of women's workshops (workshops employing no young persons or children) and domestic workshops (a private house, or room used as a factory or workshop).[3] In 1891 the Act of that year, though it allowed work in women's workshops to be done between 6 a.m. and 10 p.m., enacted that the period of employment must be a specified period.[4] In the words of Mr. Cross: "It was not the theory of the Factory Acts that Parliament wished to interfere in the least with the hours of labour of any person who, in the opinion of Parliament was able to think for himself and judge what number of hours he should work without detriment to his health. . . . Therefore men had always been excluded from the Bill as far as hours were concerned,

1 *Women's Union Journal*, Sept., 1876.

2 Parliamentary Debates, March 29th, 1878, Vol. 239, p. 263.

3 37 & 38 Vic. (1874), c. 44; 41 Vic. (1878), c. 16, ss. 15 & 16

4 54 & 55 Vic. (1891), c. 75.

and as far as safety was concerned that was another matter."[1] Indeed, most of the regulations applying to health and sanitation have in the later Acts been made to apply equally to men and women, and though legislation has not interfered with the hours of labour of men, they have in practice also been reduced to correspond to those of women. Further restrictions were imposed on the employment of women by the Act of 1895,[2] which limited their hours to sixty per week in laundries. In this year, as also six years later, when the Consolidating Act of 1901 was put on the Statute Book, opposition from women, especially from suffragettes, was as strong as ever, but by that time Trade Union women appear to have changed their minds as to the value of factory legislation: "The Bill of 1895 was supported by organizations of working women as previous ones had not been.... Petitions were sent in and meetings held in support of the Bill, by, I believe, all the Trade Unions of women as well as by the Women's Co-operative Guild which is mainly composed of women textile workers."[3]

The factory code was consolidated by the Act of 1901, which, with the Acts of 1907, 1916, 1920 and 1926 to-day form the Workers' Charter.[4] By the Act of 1901 the hours of labour were regulated in textile and non-textile factories, and in women's workshops, Sunday employment, with certain exceptions, was prohibited, night work with certain exceptions also. Subject to certain exceptions, all of which were laid down in the Act, meals had to be taken simultaneously and outside any room in which employment was being carried on, and overtime and holidays were provided for. No woman was to return to work till four weeks after childbirth. The Act of 1907 extended the general provisions of the 1901 Act to

1 Parliamentary Debates, March 29th, 1878, Vol. 239, p. 265.

2 58 & 59 Vic. (1895), c. 37.

3 Webb: *Problems of Modern Industry*, IV, 82 n.; See also Drake: *Women in Trade Unions*, p. 27.

4 1 Ed. VII (1901), c. 22; 7 Ed. VII (1907), c. 39; 6 & 7 Geo. V (1916), c. 31; 10 & 11 Geo. V (1920), c. 65; 10 & 11 Geo. V (1920), c. 62; 16 & 17 Geo. V (1926), c. 37.

laundries.[1] In 1911 Regulation 752 was gazetted, by which "no person under 16 years of age and no female shall be employed in any lead process."[2] In the same year the Coal Mines Act[3] consolidated the law relating to coal mines and certain other mines, and re-enacted the provisions prohibiting the employment of women below ground and regulating their employment above ground. In 1912 the Shops Act of that year gave to women yet further protection, for it enacted that in all rooms of a shop where female assistants are employed, seats should be provided behind the counter, or in such other position as may be suitable for the purpose, and such seats shall be in the proportion of not less than one seat to every three female shop assistants employed in each room.[4]

Legislation had then before the War gradually extended the special protection of women from one industry to another, and had also extended the scope of the protection itself. At a very early stage in the War restrictions on the hours of labour were relaxed; overtime was allowed, Sunday employment and night work were permitted.[5] "After two years of war much of this relaxation was found to be uneconomical and baneful, and in September 1916 the Home Office issued a general order, based upon the recommendations of the Health of Munition Workers Committee, by which the employment of women was limited to the 60 hours a week permitted under the Factory and Workshop Act, though within this limit night work was allowed and work for not more than 14 hours (including meal times) instead of 12 on any one day. The employment at night of girls between 16 and 18 was allowed only in special circumstances, and of girls under 16 not at all. Sunday work was largely reduced for both sexes by instructions

1 Factory and Workshops Act, 1907; 7 Ed. VII, c. 39.
2 Factory and Workshops Act. Redfern.
3 1 & 2 Geo. V, c. 50, ss. 91, 92.
4 The Shops Act, 1912; 2 & 3 Geo. V, c. 3, s. 3.
5 Report of War Cabinet Committee on Women in Industry, p. 108. (Cmd. 135).

from the Minister of Munitions, issued in April 1917. In the last two years of the War other steps were taken by the Home Office and the Ministry of Munitions to reduce hours and Sunday work in the interests, not only of the worker, but of production." In 1919 the International Labour Organization of the League of Nations, which met in Washington, adopted certain conventions with regard to the work of women.[1] The convention which forbade the night work of women received statutory sanction in England in 1920,[2] when it was enacted that, with certain exceptions, "no young person or woman shall be employed at night in any industrial undertaking." In 1926 the Lead Paint (Protection Against Poisoning) Act[3] extended differential protection yet further by prohibiting the employment of women and young persons on painting buildings with lead paint.

In 1930[4] the British Government put forward the proposal that the Washington Convention be amended by adding the words "This Convention does not apply to persons holding responsible positions of management and who do not ordinarily perform manual work," and it came before the International Labour Conference in 1931. The resolution was not adopted, but the point was raised as to whether the Convention did apply to women engaged in such work. The question was submitted to the Permanent Court of International Justice by the Council of the League of Nations in 1932, and in November 1932 the Court delivered its opinion in the affirmative.[5] Both the Convention itself and the interpretation placed on it by the Permanent Court are vehemently opposed by women of one school of thought. The old controversy is not yet ended, and there is still a considerable divergence of opinion as to whether

1 See Schedule to Employment of Women Act, 10 & 11 Geo. V, c. 65.

2 Employment of Women, Young Persons and Children Act, 10 & 11 Geo. V, c. 65, s. 1 (3).

3 Lead Paint (Protection Against Poisoning) Act, 1926, 16 & 17 Geo. V, c. 37, s. 2.

4 I.L.O. Year Book, 1932, p. 173. 5 *Ibid.*

or no it is desirable to give to women workers a special protection which is not given to men. One school of thought, which includes many women Trade Unionists, argues that since woman is biologically different from man certain activities are more harmful to her than they are to him, while home duties, from which man for the most part escapes, make further demands on her strength. Thus, it is stated, that "night work harms women more than men, as they are more prone than men to anæmia, and in addition domestic work prevents them, especially if they are married, from getting the right amount of sleep in day-time."[1] "Occupations involving much standing are probably worse for women than men owing to their greater liability to varicose veins."[2] "The need for rest rooms was greater for women than for men on account of some of the former being periodically unwell for a few hours; otherwise men should enjoy the same good conditions which were considered necessary for women."[3] "Pregnant women should not be allowed to work in the factories at all because of the danger of miscarriage in the first three months, and later because they ought to be allowed greater freedom of action than a factory can give."[4]

"Speaking generally," says the Report of the Standing Joint Committee of Industrial Women's Organisations, "women are less capable of violent muscular effort than men and cannot undertake work entailing so heavy a physical strain. . . . If women could be relieved of domestic duties, it may be that their resistance to industrial fatigue would approximate more nearly to that of men, but legislation has to deal with things as they are."[5]

On the other hand, there is a large and influential school which objects to the differential treatment of men and women. "I note with concern," wrote Mrs. Sidney Webb in 1919,

[1] Evidence before Committee on Women in Industry, p. 198 (Cmd. 167).
[2] *Ibid.*, p. 190. [3] *Ibid.*, p. 202.
[4] *Ibid.*, p. 200. [5] Published by the Labour Party, 1927.

" that my colleagues in their report advocate an extension and elaboration of the regulations of the Factory Acts in the case of women only; and advise that such provisions should be inserted in the consolidated Factory Act that is now overdue. . . . I see no reason why, in the interests of the community as a whole, the prescribed national minimum with regard to sanitation and amenity in the factory, with regard to the provision of medical attendance, and with regard to securing a due proportion of each twenty-four hours for rest and recreation should be any lower or any different for workers of one sex than for workers of the other. " It is contended by this school of thought that the health and well-being of men require the protection of law to the same extent as the health and well-being of woman, and that the concern with the health of men is long overdue.[1] And indeed there is as much evidence to prove this contention as to prove the converse. Contradiction may be given to each of the arguments which we adduced above. " Night work is not found to be more disadvantageous to women, even to young women, than to men." [2] " Night work is bad for both men and women; it lowers their vitality and predisposes them to phthisis, and the impracticability of getting proper sleep during the day is unhealthy." [3] " Unless they already have varicose veins or prolapse, standing does not harm woman, though it causes fatigue." [4] " Pregnant women should continue to work, though in the last few months they should be put on lighter work." [5] " The Conference pointed out that the muscular use of the body provides its physical development . . . and that women should have the same right as a man to earn her living underground . . . and urged. . . that any convention on night work should be the same for men and women." [6]

1 Minority Report of Committee on Women in Industry, p. 283 (Cmd. 135).
2 Evidence before Committee on Women in Industry, p. 203 (Cmd. 176).
3 *Ibid.*, p. 199. 4 *Ibid.*, p. 199. 5 *Ibid.*, p. 191.
6 Press notice of Open-Door International, August, 1933.

With regard to the argument that woman has work to perform inside and not merely outside the home, and that therefore night work, overtime and long hours mean a far heavier burden to her than to man, it is clearly obvious that under the present organization of society it is perfectly justified. To many women, married and single, the cessation of work in the factory or the office means the beginning of work in the home. If then, this double burden is not to be imposed, if the ideal "a fair field and no favour" is to be a reality and not a mere mirage the demands made on man and woman must be equalized. "Women," said Dr. Christine Murrell, "should have the same hours of work as man, and like men, should have the domestic work of their houses done for them."[1] So long as woman is subjected to differential treatment as a worker so long will the field of employment open to women be restricted.[2]

But, within the ranks of those who agree that there should be no differential treatment as between men and women employed in industry, there is a division of opinion as to the methods which should be adopted to secure equality. To one school of thought immediate equality is the only objective and to this school, in all circumstances, the removal of legislative protection is preferable to the half measure of protection for women. To the other school immediate equality is not the only objective. The exponents of this point of view, while insisting that legislation for the protection of workers should be based, not upon sex, but upon the nature of the occupation, hold themselves free, when any particular protective or restrictive regulation is under consideration, either to work for the extension of the regulation to both sexes, or to oppose it for both sexes. It is clearly arguable that the hoped for extension of the

[1] Committee of Women in Industry, p. 200.

[2] Cf. "A Study of the Factors which have operated in the past and those which are operating now to determine the distribution of Women in Industry" (Cmd. 3508), and comment in *The Woman's Leader*, March 14th, 1930, under title "Not Proven."

regulation to men may remain a pious aspiration and that in the meantime women suffer under differential legislation. But this possibility has not been overlooked, and the resolution which asks that the merits of the case should decide the attitude to be adopted lays it down that three factors shall be taken into account:—(*a*) Whether the proposed regulation will promote the well-being of the community and of the workers affected. (*b*) Whether the workers affected desire the regulation and are promoting it through their organizations. (*c*) Whether the policy of securing equality through extension or through opposition is the more likely to meet with a rapid and permanent success.[1]

EQUALITY OF PAYMENT

It is argued by many people, and not only by those who are opposed to the further emancipation of women but by some who wholeheartedly support it, that for various reasons sex differentiation in salary is justified.

If, either because she requires special protection, or because of her home duties, or because she is physically less strong, or because of her hope of marriage, woman is less valuable to her employer than man is, she must, it is argued, be prepared to accept a lower salary or lose her chance of employment in many occupations altogether. On these grounds the Committee which considered the question of payment to State servants and reported in 1923 declared itself in favour of lower remuneration for women.[2] And, on the same reasoning, the Majority Report of the War Cabinet on Women in Industry which reported in 1919, interpreted "equal pay for equal work" to mean "that pay should be in proportion to efficient output", and recommended that employers should be allowed to deduct from the wages of women the extra cost of employing her.[3] This recommendation has been opposed by many women and

1 Leaflet by Miss Rathbone. *Protective Legislation*, 1927-28.
2 Report of Committee on Pay, etc., of State Servants. (1923), ss. 43, 44.
3 Report of Cabinet Committee on Women in Industry, 1919 (Cmd. 135).

by men Trade Unionists.[1] By women, on the ground that the cost of employing efficient women should not be greater than the cost of employing efficient men, and by both men and women on the ground that it would be utterly impossible to check an employer's calculations, since many of the causes which are alleged to make women less efficient workers than men—for example, their irregularity, or their lack of ambition due to the prospects of retiring on marriage—cannot be computed with any degree of accuracy. In the result, women would be doing the work for a lower wage and men would either have to accept the same remuneration or allow women to oust them from the jobs.

Sex differentiation in salary is often justified, not on the grounds that women are less efficient in their work than men but on the ground that women have fewer requirements than men, that they look upon their wages merely as pocket money, and that women have no families to maintain. Already in 1875 the *Woman's Suffrage Journal* quoted and italicized the following remark from the Report of the Civil Service Inquiry: "The experience of the Post Office shows that women are well qualified for clerical work of a less important character and are *satisfied with a lower rate of pay than is expected by men similarly employed*",[2] and the Report of the Committee on Pay, etc., of State Servants, issued in 1923, made a similar declaration which was bitterly resented by women in the Civil Service:[3] "So far as we are advised the Civil Service will have no difficulty in recruiting educated women of the type they require at less rates than men, and the pay of women would still be higher than they could normally obtain elsewhere".[4]

The case against the first argument, namely that women

1 B. Drake, *Women in the Engineering Trades*; Evidence before the Committee on Women in Industry. Cmd. 167.
2 *Woman's Suffrage Journal*, September, 1875.
3 *Manchester Guardian*, 14th August, 1923.
4 Report of Committee on Pay, etc. of State Servants (1923).

have fewer requirements than men, was put with great clarity by Mrs. Sidney Webb in her Minority Report on Women in Industry: "If most women need to spend less on food than most men (though not women of more than average size and physical exertion than men of less than average size and physical exertion), they usually have to pay more than men for lodgings compatible with a life of equal dignity and refinement. Their clothes cost, for an equal effect, more than those of the men; and more is expected of them. They need to save more than the men for the lost time due to short spells of illness. Their books and newspapers, like their tram rides, are the same to them in price as to the men."[1]

The second argument that women look upon their wages merely as pocket-money, being supported by the male members of their families, would have had much truth on its side some sixty, or even twenty, years ago. Thus, Sophia Jex Blake, when she wished to earn her own living, had to contend with the traditions and prejudices of centuries, according to which a social stigma attached to a woman who earned her own living and to her male relatives who permitted it. "You as a man," she wrote to her father, a man of considerable enlightenment who sympathized with his daughter's ambitions, but could not reconcile himself to her earning money, "did your work and received your payment and no one thought it any degradation, but a fair exchange. Why should the difference of my sex alter the laws of right and honour? . . . there is the honest, and I believe, perfectly justifiable pride of earning. . . ."[2] With the change in the status of women this prejudice is dying out, and, in any case, too many women enter the labour market to-day with nothing but their own earnings to depend on to make it a consideration of any

[1] Minority Report, Ch. XI, s. 2. Report of Cabinet Committee on Women in Industry, *supra*.

[2] *Life of Sophia Jex Blake*, by M. Todd, Pt. I, Ch. VI.

importance. Women feel that, as a matter of simple justice, they should receive the same remuneration as men for work of the same character.

There is yet one ground on which sex differentiation in salary may be justified. The burden of providing for wife and family falls, as a general rule, on man. To what extent this consideration actually affects the rate of payment it is difficult to say, since such a rate depends on a number of factors, but that it has some effect is certain, and where the State interferes in the fixing of wages in order to secure to workers a decent standard of life it will have to be taken into account. It is generally recognized as equitable that it should. In New South Wales it was recognized that a minimum wage must cover the subsistence needs of a family of five.[1] It is, however, very generally contended that the national dividend is not large enough to make such a scheme practicable[2] and it is further asserted by many that, since a large number of men have no families to keep, it is unnecessary to pay them wages based on the needs of five people. Thus, by another route, we are again brought to the consideration of the proposal of family endowment. The advocates of family endowment contend that if it be accepted then a minimum wage may be based on the prime needs of two people, and thus the single man and the single woman will receive equal treatment, while the man or woman with a family to maintain will receive remuneration commensurate with his or her responsibilities. Thus and thus only, they contend, can the question of payment be solved to the satisfaction of both men and women and in the interests of society. Family allowances are in operation in the Civil Service in many countries on the continent of Europe,[3] and, in this

1 *The Next Step: A Family Basic Wage*, by A. B. Piddington.

2 Ch. III, p. 113.

3 League of Nation Publications. *Family Allowances and Colonial and Foreign Experiments.* Pamphlet by Family Endowment Society.

country a voluntary scheme of educational allowances was instituted in 1925 at the London School of Economics.[1]

For years Trade Unions have struggled to raise the wages of men and have opposed the entry of women into the more highly skilled and more highly paid trades because they have feared that cheaper women's labour, whatever its cause, would force down their wages. If, then, women desire to enter the higher grades of industry, of the professions and of the Civil Service, they will have to compete with men on equal conditions and they will have to face the possibility that, under such conditions, they may be unable to hold their own. If they are displaced from employments which they are by nature less well fitted to perform, it is in the interests of society that such displacements should be made. But where their disability is due to some artificially induced handicap women will have to find the means of removing it. Thus, they will be unable to accept protective legislation confined to their sex only; thus, too, they will have to find means whereby the household duties of women engaged in work outside the home may be considerably lightened. Possibly, as has been suggested elsewhere, the day is not so far distant when it will be quite customary for men and women to share in the domestic work of the home, as it is, indeed, already far more customary than it was. In this connexion the comment of the Committee which reported on the Differentiation of Curricula between the Sexes may be noted: "The Committee desire to express a hope (they cannot in the nature of the case make a recommendation) that the parents of girls in secondary day schools will not expect them to perform an excessive amount of domestic work in the home; and they would add that they welcome the tendency of the Boy Scout organization in encouraging boys to perform

[1] "Memorandum on Family Allowances in the Teaching Profession." Presented to the Family Endowment Society to the members of the Standing Joint Committee on Teachers' Salary.—£30 per annum is paid for each child from birth to the age of 13, and £60 from 13 to 22 if the child is at place of education appointed by the authorities.

their share of household duties."[1] The lower value of women due to the possibility of marriage is, one is inclined to think, considerably exaggerated. It is undoubtedly true that many girls do look forward to marriage and to exchanging work in the office and workshop for work in the home. But young women, like young men, as a rule, begin their careers on the bottom rung of the professional or industrial ladder and the unambitious woman, like the unambitious man, will remain in the less responsible posts, which can easily be filled should she resign on marriage. It is also undoubtedly true that many women, who have given of their best to their work and could rise or have risen to responsible positions, leave them on marriage; some because they marry out of the district and others because they wish to give their undivided attention to home and children. And it may be that as a result of this, some types of work will be closed to women because only those who are preparing for the higher jobs are entitled to the lower posts which are regarded as preparatory stages. But in the majority of posts continuity of work is of little importance; it is a common thing for a man to move from one post to another to better himself, and it can make no difference to an employer whether his employee leaves to take up work elsewhere or in order to be married. It may, moreover, be predicted that, with the removal of the marriage bar, many women would remain in posts which they are at present compelled to relinquish on marriage.

The demand for equal pay for equal work has been voiced for many years. In 1888 a resolution advocating it was passed at the Trades Union Congress: "That where women do the same work as men they shall receive the same pay". Later the formula was amended so as to read "they shall receive equal pay for the same job" to ensure a correct interpretation

[1] Report of Committee on Differentiation of Curricula between the Sexes, 1922, p. 149.

of it, and women's organizations have adopted a similar wording. In 1908, the Association of Post Office Women Clerks placed the question on their programme at the Annual Meeting, and between 1910 and 1913 Bills were introduced into the House of Commons to give women equal pay with men. The members of the MacDonnell Commission, which reported in April 1914, did not come to an unanimous decision on the question, and it was again examined by the War Cabinet Committee which reported in 1919. The Minority Report, signed by Mrs. Sidney Webb, was in favour of equal pay, the Majority Report gave the qualified consent to which reference has already been made.[1] In 1920 the House of Commons for the first time made a public pronouncement with the resolution: "That it is expedient that women should have equal opportunity of employment with men in all branches of the Civil Service within the United Kingdom and under all local authorities, provided that the claims of ex-Service men are first of all considered, and should also receive equal pay." The resolution was not accepted by His Majesty's Government, but in August 1921 the following resolution was passed by the House and accepted by the Government: "That, having regard to the present financial position of the country, this House cannot commit itself to the increase in the Civil Service salaries involved in the payment of women in all cases at the same rate as men; but that the question of the remuneration of women as compared with men shall be reviewed within a period not exceeding three years."[2] So far financial stringency has been invoked whenever the question of putting the principle into practice has been suggested. The matter was again examined by the Royal Commission on the Civil Service which reported in 1930, and again the Commissioners were unable to come to an unanimous decision.

[1] Report of Cabinet Committee on Women in Industry (1919), Cmd. 135.
[2] Report of Royal Commission on the Civil Service (1930), Cmd.

It may be noted here that women's rates of contributions and of benefits are lower than those of men both under the Unemployment Insurance Act and under the National Health Insurance Act,[1] and here too equality of contributions and of benefits is sought. "Contributory insurance is part of the wage system of a country; a legal part of it, like Trade Boards. And if, like Trade Boards, it fixes upon women a lower status and a lower economic value on the grounds of her sex it, as much as our inequitable industrial wage system, tends to depress the economic position of women. . . ."[2]

THE MARRIED WOMAN WORKER

"The woman question will never be solved in any complete way so long as marriage is thought to be incompatible with freedom and an independent career". Thus wrote Elizabeth Garrett in 1870 to her sister, Millicent Garrett Fawcett, to announce her engagement to Mr. Anderson and her intention to carry on her medical work.[3] Yet marriage and an independent career are still held to be incompatible, and those who believe that Elizabeth Garrett Anderson spoke a profound truth have still to convert the public opinion of to-day.

The question did not arouse any attention until about the end of last century. In the Civil Service women, although employed in the Post Office from about 1870, were not sufficiently numerous to necessitate any regulations being promulgated. By 1894, however, the position had changed, and a Treasury Minute of that year laid it down that women typists should resign on marriage and made provision for the grant of a marriage gratuity.[4] In 1895 the marriage gratuity arrangement was extended to all established women Civil Servants whose resignation was required on marriage, and from that

1 Unemployment Insurance Acts.

2 Annual Report, 1932, Open-Door Council; and Report of Women's Freedom League, *Manchester Guardian*, April 16th, 1934.

3 "Millicent Garrett Fawcett," by Ray Strachey, p. 57.

4 Report of Royal Commission on the Civil Service (1930) Cmd. 3909, Sec. XII.

date few married women have, in practice, been employed in the Departments. The Royal Commission on the Civil Service, which was appointed in 1912,[1] considered the question but was unable to submit an unanimous recommendation, and in July 1920 an Order in Council was made which authorized "the making of regulations as to the mode of admission and conditions of appointment of women to the Civil Service".[2] The matter was debated in the House of Commons in August 1921[3] along with other matters affecting the position of women in the Civil Service. The feeling of the House, in spite of the efforts of a minority, was against the lifting of the marriage bar, and the resolution which was accepted by the Government was so worded as to allow regulations compelling retirement on marriage to be made. In August 1921, the Civil Service Commissioners accordingly issued the Regulations which are still in force.[4] Sections 1 and 2 read as follows: (1) All female candidates for an established situation in any of His Majesty's Civil establishments shall be unmarried or widows; (2) (*a*) Women appointed to or holding any established situation in any of His Majesty's Civil establishments shall be required to resign their appointments on marriage. . . ." Section 2 (*b*) provides for the granting of a marriage gratuity "at the discretion of the head of the Department and with the approval of the Treasury", and Section 3 permits the Departments to retain the services of married women "if it is in the interests of the Public Service that such exceptions should be made." The Royal Commission on the Civil Service appointed in 1929 heard evidence both in favour of and against the retention of married women in the Service, some women Civil Servants supporting the present policy. Again

1 Report of Royal Commission on the Civil Service (1915), Cmd. 7983.
2 S.R.O. 1920, No. 1977.
3 Parliamentary Debates, 5th August, 1921, Vol. 145, p. 1890.
4 Regulations with regard to the Admission of Married Women to and Employment of Married Women in Established Situations. 26th August, 1921.

the Commissioners were unable to come to an unanimous decision. The recommendation of the majority was that the compulsory retirement on marriage should continue but that the Departments should avail themselves to a greater degree than hitherto of their power to retain suitable women. The Joint Committee, to whose report reference has already been made, has merely reiterated this recommendation of the Commission.[1]

The question of a local authority's right to dismiss women on marriage was raised in the Courts in 1923 and again in 1895. The powers of a local education authority to discharge its officials is given by s. 148 (1) of the Education Act 1921: "A local education authority may appoint . . . teachers, to hold office during the pleasure of the authority, and . . . may remove any of those officers. . . ."[2] Wide powers are thus given, but it has been laid down that although the authority has unfettered power of dismissal" yet "if an attempt is made to exercise these powers corruptly . . . for some improper purpose such an attempt must fail."[3]

In 1925 the case of Short *v.* Poole Corporation came before the Court of Appeal. The plaintiff was a married woman who was discharged from her post as teacher by the Corporation on the ground that the retention of married women, whose husbands were alive and capable of maintaining them, was undesirable. The Corporation was of opinion that "(1) the duty of married women was primarily to look after her domestic concerns, and they regarded it as impossible for her to do so and to act effectively and satisfactorily as a teacher at the same time; and (2) it was unfair to the large number of unmarried teachers who were at present seeking situations that the positions should be occupied by married women who

1 Report of Royal Commission on the Civil Service and Minutes of Evidence, 1930, Cmd. 3909.

2 11 & 12 Geo. V, c. 51, s. 148 (1).

3 Short *v.* Poole Corporation (1926), Ch. 66, per Pollock, *M.R.*

presumably had husbands capable of supporting them." [1] The plaintiff sought a declaration that the notice was invalid and an injunction restraining the defendants from acting upon it. Romer *J.* gave judgment in favour of the plaintiff, which decision was reversed by the Court of Appeal on the ground that the plaintiff could not prove "that the local authority had acted corruptly or *mala fide*, that is, for a purpose other than that for which their powers were entrusted to them" [2]: "A determination," said Warrington *L.J.*, "to employ, as far as possible, women who are devoting their lives and energies entirely to the business of teaching without assuming the privilege of domestic ties cannot, in my judgment, be irrelevant to the maintenance of the efficiency of the schools or the cause of education in the district. So also if the adoption of the policy in question resulted from a desire that single women might be encouraged to undergo training with a fair hope of employment, it would not, as I think, be irrelevant to the question of efficiency or the cause of education." [3] Indeed it would appear that s. 148 gives such wide powers to local authorities that it is doubtful, as Lawrence *J.* pointed out in the case of Fennell *v.* East Ham Corporation, "whether there is any further question to be asked when the plaintiff admits that the defendants in giving notice had not acted corruptly or *mala fide*." [4]

In 1930 a Bill to amend the Law with respect to the employment of married women teachers was introduced into the House of Commons,[5] the first clause of which read as follows: "A woman shall not be refused employment or dismissed from employment as a teacher by any local authority on the grounds only that she is married or is about to be married". The Bill was not proceeded with. Nor is it clear that it would have

1 Short *v.* Poole Corporation (1926), Ch. 66, per Pollock, *M.R.*
2 Short *v.* Poole Corporation (1926), Ch. per Sargant, *L.J.*
3 *Ibid.*
4 Fennell *v.* East Ham Corporation (1926) Ch. 641.
5 20 & 21 Geo. V, Bill 222.

served any useful purpose. Married women, it is submitted, cannot to-day be discharged on the ground only of marriage; the policy of dismissing women on marriage must be proved to be one which a local authority, acting *bona fide* and without corruption, adopts as necessary in the interests of the education of the district. An Act could, no doubt, be passed which would have the results desired by the supporters of the Bill, but in the meantime they seem to have one remedy only and that the creation of a public opinion which will insist on a different policy when next local Councillors seek election.

In the industrial and professional worlds the refusal to engage married women and the dismissal of women on marriage is the policy of some firms and institutions. Again, the change must come through a change in public opinion, since private employers may engage and dismiss, provided proper notice is given for any reason they think good.

Of the advocates of woman's right to retain her profession on marriage, few, if any, people in this country suggest that every woman should carry on paid work after marriage. Many women did not, and do not, approve of giving a widows' pension to young, childless widows, on the ground that there is nothing to prevent such women from returning to and earning a living in the labour market.[1] But the demand for pensions for widows with children, the advocacy of family allowances, the suggestion that a wife should be legally entitled to a share of her husband's income all show that there is to-day in this country no wish to free women from the domestic responsibilities of their individual families and no belief that the employment of all women outside their homes would lead to greater social well-being. What women do claim is that they should have the right to decide for themselves whether they will do so or not. Anything less, they contend, is an unwarrantable interference in the private life of the individual, which no

[1] *Times* Newspaper, May 19, 1928, p. 12; July 28, p. 7.

one would seek to impose on any other member of the community.

To some women economic independence is of no importance; to others economic dependence is intolerable.[1] There are women, as there are men, whose self-respect demands that they should maintain themselves, or at least be in a position to maintain themselves should circumstances make it necessary for them to do so. He who cannot support himself is without the means of guiding his own life. In no other relationship does society ask whether two incomes are going into the same household, since in every other relationship the individuality of each member is recognized. Nor is the economic aspect the only one to be considered. There are many women who wish to devote their whole time and energy to domestic duties in the home; there are others who prefer to employ some one to assist them in the house so that they may be free to devote part of their time to outside work, which is frequently unpaid. There are yet other women to whom a career is as necessary for the fulfilment of personality as it is to a man, and who delegate their domestic work to others better qualified to perform it. In the result such women have more of value to give to their families than they would otherwise have, while the work which they perform gains from their experiences of marriage and motherhood.

Gone are the days when woman was content to accept a pattern of life laid down for her by men, gone too the days when whole aspects of life were accepted as closed to her. "The custom of establishing hard and fast oppositions between 'man' and 'woman', in this field as in others, will not bear serious consideration, though it is not yet extinct. Women, like their brothers, had fathers, and however numerous the minor distinctions between masculine and feminine nature, they inherit the same fundamental human nature."[2]

[1] E.g. Emmeline Pankhurst, *The Suffragette Movement* by Sylvia Pankhurst.

[2] Havelock Ellis, *The Psychology of Sex*, Ch. VII.

APPENDIX

PAGES 69 *and* 119.

The Report of the Committee appointed by the Home Secretary in June 1933 was presented in July 1934.[1]

In paragraph vii, p. 58, the Report deals with the "Attachment of Pension or Income (including Wages) and the application of Unemployment Benefit". Commenting on Section 2 of the Affiliation Orders Act 1914 (4 & 5 Geo. V., c. 6) which provides that "justices . . . may, in any case where there is any pension or income payable to the person on whom the affiliation order has been made and *capable of being attached* . . . order that such an amount each week as is specified in the affiliation order or any part of such amount be attached . . .", the Report says: "Although a wife maintenance order is enforceable in the same manner as an affiliation order, it is in some quarters regarded as doubtful whether this particular provision can be regarded as applying to the former class of order. . . ."

The Report recommends that "in case of default, courts should have the power to order the defaulter's employer to make deductions from his salary or wages and pay the amounts deducted to the Collecting Officer of the Court. If the defaulter is a pensioner, the Court should be authorized, if it thinks fit, to inquire of the pension authority whether it is prepared to make deductions from the defaulter's pension in satisfaction of the order. . . ."[2]

[1] Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and Other Sums of Money. Cmd. 4649.

[2] *Ibid*, p. 89.

The Report makes various other recommendations. Among others: "The amount payable under such orders should be fixed having regard to the age, means, circumstances and earning capacity of each of the parties. . . ." "Before issuing a warrant of committal to prison for failure to pay, the Court should investigate the question how far failure is due to circumstances beyond the defaulter's control, and should only issue a warrant if satisfied . . . that his default is due to wilful refusal or culpable neglect. . . ." [1] "Courts should have unrestricted power to excuse the whole or part of any arrears, and in no case should more than two years' arrears be recoverable." [2] If these recommendations are acted upon injustices which to-day bear heavily on both men and women will have been removed.

PAGE 120.

The Report recommends that "in affiliation cases . . . in the event of the complainant being convicted of perjury or subornation of perjury in the original proceedings, the Court before which she is convicted, or the Court of Summary Jurisdiction charged with the enforcement of the order should have power, upon the application of the putative father, to annul the adjudication of paternity." [3]

PAGE 79.

On May 15, 1934, Lord Listowel moved the second reading of the Summary Jurisdiction (Domestic Procedure) Bill, the purpose of which was "to secure that disputes arising between husband and wife should . . . be heard . . . under a special domestic procedure based on the principle of conciliation instead of that of litigation." [4] The Bill, as drafted, met with

1 *Ibid.* 2 *Ibid* 3 *Ibid*, p. 90.
4 The *Manchester Guardian*, May 16, 1934.

opposition and was withdrawn, but the Lord Chancellor stated that " the Home Secretary was prepared to have examined the question as to whether particular days should be assigned for the hearing of husband-and-wife cases and whether it was possible to extend and develop the present method . . . of subjecting applicants for separation orders and summonses in respect of matrimonial disputes to a preliminary informal investigation. . . ." [1]

PAGE 146.

On April 27, 1934, on the report stage of the Inheritance (Family Provisions) Bill, the first clause was still under discussion when the House adjourned, and the Bill was " talked out ".

PAGES 123–124.

At the Methodist Conference which met on July 21, 1934, the resolutions passed provisionally at the 1933 Conference were dismissed. A resolution was moved asking the Conference to declare " that a woman who believes herself called of God to the work of the ordained ministry may offer herself as a candidate for the itinerant ministry ". The amendment " that there was not sufficient support for the scheme to justify procedure into the main project at present " was carried. A new committee was appointed to consider such developments of the existing ministries of women as may provide more effectively for their service to the Church.[2]

PAGE 142.

It has recently been held in *in re* Garret (1934) 1 Ch. 477, that notwithstanding the restraint on anticipation imposed by

[1] *Ibid.*
[2] Report from *Manchester Guardian*, July 23, 1934.

a will on the mother of an infant, she is capable of giving a valid consent to the exercise by the trustees of their power of advancement under s. 32 (1) of the Trustee Act, 1925 (15 Geo. V, c. 19). She may thus consent to an advance of money for the benefit of her child even though she herself is prejudiced by the advance.

INDEX

INDEX

INDEX